JD(SF)–29-09
Phoenix, AZ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES – SAN FRANCISCO BRANCH OFFICE

BASHAS', Inc., d/b/a BASHAS', FOOD CITY, and A.J.'S FINE FOODS	
and	Cases 28–CA–21435 28–CA–21501
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 99	
and	Cases 28–CA–21590 28–CA–21592
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION	28–CA–21639 28–CA–21640 28–CA–21646 28–CA–21676 28–CA–21739 28–CA–21785 28–CA–21803

Sandra L. Lyons, Johannes Lauterborn, and Jerome Schmidt, Attys., for the General Counsel.

Lawrence A. Katz, Thomas M. Stanek, Mark G. Kisicki, Elizabeth Townsend, and Isaac Hernandez, Attys. (Steptoe & Johnson, LLC), of Phoenix, Arizona, for Respondent.

Gregg J. Tucek, Atty., Bashas' Inc., for Respondent.

Michael C. Hughes, Atty. (Davis, Cowell & Bowe, LLP), of San Francisco, California, for the Charging Parties.

DECISION

Statement of the Case

WILLIAM L. SCHMIDT, Administrative Law Judge. I conducted the hearing in this consolidated proceeding at Phoenix, Arizona, over the course of 20 days between April 15 and August 14, 2008, pursuant to a third consolidated complaint (complaint), as twice amended, issued by the Regional Director on March 28, 2007. The complaint, which contains 78 separate unfair labor practice allegations, avers that Bashas', Inc.[1] (Bashas, Company, or Respondent) violated Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (Act) based on two

[1] Respondent's legal name includes the possessive apostrophe. Throughout this decision I have dropped the apostrophe when referring to Respondent by its proper name except in those instances where correct punctuation otherwise required an apostrophe.

charges filed by United Food and Commercial Workers Union, Local 99 (Local 99) and nine charges filed by the United Food and Commercial Workers International Union (UFCW).[2] Bashas' filed answers to the complaint and its amendments denying that it engaged in the unfair labor practices alleged.

At the hearing the parties had the opportunity to call and examine witnesses, to introduce relevant documentary evidence, and to argue procedural and substantive issues.[3] At the close of the hearing, the parties were provided the opportunity to file posthearing briefs. After carefully considering the hearing record in light of my credibility determinations,[4] and the arguments detailed in posthearing briefs filed on behalf of the General Counsel, Bashas, Local 99, and the UFCW, I find Respondent violated the Act in certain respects but not in others based on the following.

FINDINGS OF FACT

I. JURISDICTION AND GENERAL BACKGROUND

Bashas, an Arizona corporation headquartered in Phoenix, is engaged in the retail sale of groceries, meat, and related products from approximately 160 outlets operating under the trade names of Bashas', Food City, AJ's Fine Foods, and Ike's Farmer Market that are located in Arizona, New Mexico, and California. It derives gross revenues in excess of $500,000 annually, and it annually purchases and receives at its Arizona facilities goods valued in excess of $50,000, directly from locations outside the State of Arizona. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Local 99 and the UFCW are each labor organizations within the meaning of Section 2(5) of the Act. I find that it would effectuate the purposes of the Act for the Board to exercise its jurisdiction to resolve this labor dispute.

Respondent's stores set up under the Bashas' trade name are standard supermarkets. The Food City stores are supermarkets that specifically target Hispanic community. The A.J.'s Fine Foods stores aim at an upscale, gourmet food market. In May 2007, Bashas redesigned one of its existing stores to feature organic produce and natural foods operating under the trade

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[2] I have attached my chronology and summary of the various charges and amended charges as Appendix B. The unfair labor practices alleged in the complaint ranged from late 2006 to early 2008.

[3] The record incorrectly reflects various witness examinations on behalf of Respondent by attorney Tucek. Although Tucek appeared at the hearing from time to time, he examined no witnesses. The record is corrected to reflect those examinations were conducted by attorney Stanek. The following citation abbreviations are used below: "Tr" plus numerals is a transcript page reference. "GC Exh." (General Counsel), "R Exh." (Respondent), or "CP Exh." (Charging Party) followed by a numeral(s) refers to the party's particular exhibit. GC Br., R Br., or CP Br. followed by numerals refers to a page or pages in the party's brief.

[4] The following factors informed my credibility determinations generally: the witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; witness bias; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence; if any; the inherent probabilities; reasonable inferences available from the record as a whole; the weight of the evidence; and witness demeanor while testifying. Further discussion of specific credibility resolutions appear below in those situations that I perceived to be of particular significance.

name of Ike's Farmer Market. An important portion of this proceeding concerns Respondent's Distribution Center or warehouse located at Chandler, Arizona, a Phoenix suburb.

Until 1993, none of the Bashas' employees were represented by a labor organization. That year Bashas' acquired seven stores from Arizona Supermarkets, Inc. (ASI) and integrated them into its system as stores 63 through 69. Stores 63 and 64 operated under the AJ's Fine Foods format; the other five stores operated under the Bashas' supermarket format.[5] Local 99 represented the meatcutters and the clerks in separate bargaining units at each store, or 14 separate units in all. When it acquired these stores, Bashas' hired a majority of the former ASI employees, and recognized the Union as the bargaining representative for each of the units. However, Bashas did not adopt the existing collective-bargaining agreements. Instead, it established new employment terms for the former ASI unit employees that essentially conformed to those in the rest of its retail operation.

In 2001, Bashas' purchased two stores from ABCO Markets and integrated them in its system as stores 124 and 125. Bashas operates store 124 in its Food City format. It operated store 125 in its Bashas' format until it closed in December 2006. It reopened in May 2007 as Ike's Farmers Market. Local 99 also represented ABCO employees at both stores in separate units of meatcutters and clerks. When it took over, Bashas established new terms and conditions of employment, hired a majority of the former ABCO employees, and recognized Local 99 sans the existing collective-bargaining agreements.

Respondent also operates a 750,000 square foot warehouse and distribution center in Chandler, Arizona, where it employs over 700 employees. The employees at this facility have no union representation. In 2005, Respondent subcontracted the "offloading" and "lumping" functions to an outside contractor. In January 2008, Respondent subcontracted its "baler" operations to another outside contractor.

For a number of years, UFCW and Local 99 have attempted to organize other Bashas' employees. In a June 1, 2006 lawsuit, Bashas' filed in the Arizona Superior Court against the UFCW, Local 99, several union officials and their wives, and other entities and persons, Bashas' alleged that the UFCW has been attempting to organize its employees since at least 2001 through NLRB proceedings and a wide-ranging corporate campaign. That lawsuit formed the basis for the Board's decision that adopted Administrative Law Judge William Kocol's conclusion that Bashas' unlawfully withdrew recognition from Local 99 as the representative of employees at the former ASI and ABCO stores. See *Bashas',* 352 NLRB 391 (2008).

The UFCW's recognition efforts and the Bashas' responses turned into an acrimonious battle played out publicly in Arizona. The nature and scope of some of the charges and countercharges exchanged are shown in a verified complaint Bashas filed against the UFCW, Local 99, and numerous supporters of those labor organization in the Arizona Superior Court for Maricopa County on December 18, 2007. That wide-ranging, 44-page complaint alleges a variety of common law torts, including intentional interference with business expectancies, aiding and abetting such intentional interference, defamation, injurious falsehoods, and trespass. It recites that the UFCW commenced a corporate campaign against Bashas in 2006 and intensified that campaign with "increased vengeance" in 2007. Among other things, the complaint alleges that the UFCW and its allies, the other defendants, made public charges beginning in mid-2007 and continuing throughout the rest of the year that Bashas regularly offered goods, particularly baby formula, for sale after their expiration date. The complaint

[5] The Company permanently closed store 68 in April 2007.

claims these charges were made public on radio programs hosted by UFCW sympathizers, in an automated telephone campaign that occurred in November 2007, in an extensive mailing of flyers by the union that same month, and in reports to public officials demanding closer inspection of Bashas' stores. The complaint also alleges various acts of sabotage through the latter half of 2007, including the planting of expired goods on the shelves at the Bashas' markets and the abandonment of shopping baskets containing perishable meat products in the aisles at some of its stores. This complaint was amended in April 2008 in an effort to clarify Local 99's standing as the representative of employees at the nine stores involved in the earlier case before the NLRB.[6]

With the exception of a companywide union agent access ban and a delayed wage increase for employees at its organized stores, the various disputes consolidated into the complaint relate to two of the organized stores, three of its unorganized stores in the Phoenix area, and the Distribution Center. My findings and conclusions are generally organized into those three categories.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues Involving Bashas' Organized Retail Markets

Broadly speaking, the issues presented for resolution that involve the organized stores relate to Respondent's denial of store access to two particular union agents and Respondent's failure to grant a 2007 pay rate increase for top-of-scale unit employees at the same time it granted an increase to its comparable employees at the unorganized stores. I have also included in this section another store access issue addressed in complaint paragraph 6(m) even though that allegation grew out of Respondent's reaction to union activity that occurred, with a single exception, at Bashas' unorganized stores. The complaint also alleges a variety of independent 8(a)(1) violations related to these three central subjects.

1. Store access

a. Relevant facts

Background: The collective-bargaining agreements between Local 99 and ASI and ABCO contained provisions that provided for store access by union agents. However, Bashas' exercised its option as a successor employer at the former ASI and ABCO stores to apply its own terms and conditions of employment. In essence, Bashas' applied the same employment terms in existence at its own stores to these newly acquired stores. Those terms made no provision for store access by union representatives. However, following Bashas' acquisition of the seven ASI stores, union agents continued to visit the stores periodically over the course of the next 6 months to a year apparently with the acquiescence of the Bashas' management. For the next several years after that initial period no union agents routinely visited the represented stores for the purpose of conducting union business.

[6] The Charging Parties filed a written motion dated April 14, 2008, requesting that I take judicial notice of the December 18 complaint, *Bashas', Inc. v. United Food and Commercial Workers, et al*, No. CV2007-023144. I granted that motion. The verified complaint and the April amendment are made a part of the record in this case.

Bashas' and Local 99 began bargaining for a new collective-bargaining agreement in 1993 that would be applicable to the former ASI stores.[7] The bargaining continued without success in reaching a new agreement until early 2002 when, as one union representative put it, the parties took a break. At no time during this lengthy bargaining did the parties reach even a tentative agreement on the subject of store access by the Union's agents. In late 1998 and early in 1999, the parties exchanged a set of proposals that included access language providing for semimonthly access to the represented stores by an "authorized union representative" to check on the employees' union membership. Another provision in the draft proposals limited the amount of time the union agent could spend with an employee when visiting a store and allowed the store director to designate the place the place in the store for the union agent to meet with an employee. (R. Exh. 78: Sec. 8(a) and (b). See also R. Exh. 74: Gruender letter of November 24, 1998, items 15 and 16, and Cleckner letter responding on January 14, 1999.)

At the end of January 2006, Bashas' president, Mike Proulx, sent a letter to employees advising them of changes that would be made to Bashas' medical insurance program beginning in June 2006. The changes included a new requirement that employees pay a portion of their insurance premium. After Local 99 learned of the change from its supporters, it sent representatives out to gauge employee sentiment at the retail stores. The insurance premium issue gained the union many supporters. Sometime in May 2006, Local 99 requested to bargain over this and other changes.

Disputed Conduct at store 64: The allegation in **ccomplaint paragraph 6(a)** pertains to the events that occurred when Antonio Rivera-Sanchez, an UFCW organizer, visited store 64, an A.J. Fine Foods store in Phoenix, on December 29, 2006. Local 99 represents the employees at store 64. Alan Hanson, Rivera-Sanchez' director, sent him to store 64 to distribute a Local 99 handbill announcing that the NLRB Regional Director found merit to Local 99's charge that Bashas unilaterally changed the employees' health insurance program in violation of the Act. (See GC Exh. 69.) Rivera-Sanchez apparently also sought to distribute copies of the NLRB complaint and notice of hearing in Case 28-CA-21048.[8] Rivera-Sanchez had never visited a Bashas' store on any type of union business before. Hansen told Rivera-Sanchez that he had a right to distribute union materials at the store but never explained why.

Local 99 provided no advance notice to Bashas about Rivera-Sanchez' store visit. After entering the store, Rivera-Sanchez went to the meat department. The first employee to whom he spoke refused the documents Rivera-Sanchez offered and called the Store Director Gabe Flores.[9] While speaking to a second employee, Store Director Flores approached and told Rivera-Sanchez to leave the store or he would call the police. Rivera-Sanchez disregarded the store director's demand to leave. Instead, he walked toward another area of the store and attempted to distribute his documents to employees in other departments. Store Director Flores followed him closely, insisting that he leave the store, and trying to prevent him from distributing the union documents. Eventually, Rivera-Sanchez asked Flores to distribute them but he refused.

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[7] When Bashas' acquired the two ABCO stores in 2001, the parties agreed that the ongoing bargaining would be applicable to those stores also.

[8] The complaint in Case 28–CA–21048 issued on December 28, 2006. Subsequently, the Regional Director consolidated that case with two additional cases. The consolidated complaint formed the allegations in the prior hearing before ALJ Kocol. The Board affirmed Judge Kocol's dismissal of the allegations encompassed by Case 28-CA-21048 on Sec. 10(b) grounds.

[9] At the hearing, Respondent admitted that Gabe Flores was the store director at store 64 and that he was a supervisor within the meaning of Sec. 2(11). Tr. 1827.

When Rivera-Sanchez reached the store's flower shop, another person identified only as Ralph, the "second" store director, approached, told Rivera-Sanchez to leave the store, and purportedly bumped the union agent a few times in the direction of the exit. Rivera-Sanchez steadfastly ignored Ralph's request that he leave. Finally, two Phoenix police officers arrived and told Rivera-Sanchez to leave the store or face arrest. Rivera-Sanchez then left the store. Outside, Rivera-Sanchez called Hanson who instructed him to ask about putting copies of his documents in the breakroom. At first, Store Director Flores refused Rivera-Sanchez' request but he finally took the documents after one of the police officers appealed to him to do so. Rivera-Sanchez then left the store.

Disputed conduct at store 124: Complaint paragraphs 6(b) and (c) concern access issues at store 124 on January 18 and March 8 when store management ordered a union agent to leave the store and threatened to call the police if the agent did not comply. The union agent involved on both occasions was Lillian Flores.

Lillian Flores, an assistant to the director of UFCW Region 8,[10] began making unannounced visits to Bashas' Food City stores 124 and 125 in Yuma, Arizona, and Oro Valley (situated a few miles north of Tucson, Arizona), respectively, around the time Respondent implemented the health insurance premium change in June 2006. Local 99 represents employees at both stores. Flores estimated that she visited these two stores once or twice a week thereafter whenever an employee raised some issue about wages, hours, or working conditions.[11] Flores worked at store 124 for a few years prior to beginning her UFCW employment. Consequently, she knew the Yuma store director as well as several of the current employees. No evidence establishes that any of the management personnel at store 125 knew Flores, or that she ever engaged in any conduct at that store that would call attention to her status as a union representative. When she visited stores, Flores concededly conducted her business on the sales floor during employee worktime.

Flores encountered a problem with store management when she visited store 124 on January 18 and on March 8. She also made an unannounced visit to store 124 on January 16 ostensibly to distribute information about an NLRB charge or complaint to the employees

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[10] UFCW Region 8 is headquartered in Ontario, California. In the earlier proceeding, Flores testified that she lives and works out of her home in Mesa, Arizona. Her primary duties include organizing employees and assisting local unions with their representative functions.

[11] Her assertions about the frequency of her visits are not corroborated or contradicted. However, I do not credit Flores' testimony on this point. In the earlier proceeding, Judge Kocol found that Flores "visited [s]tore 125 from time to time." Following a visit in June 2006, she told her superiors about employee concerns over the closing but that information inspired no action on Local 99's part. 352 NLRB at 397. However, I find it highly improbable that she would have never spoken to any management representative about an issue brought to her attention by any employee but, if she did so, neither General Counsel nor the Charging Party proffered any evidence to establish that important fact. Additionally, she claimed that she never saw the store 124 director until her visit on January 16, which, by her testimony, would have been roughly her 50th visit to that store over the preceding 7 or 8 months. That strikes me as highly improbable. Accordingly, I decline to rely on her testimony concerning the frequency of her store visits. *NLRB. v. Homedale Tractor & Equipment Co.,* 211 F.2d 309, 315 (9th Cir. 1954) (the Board may discredit testimony of interested witnesses even though such testimony is not contradicted). See also *NLRB. v. Operating Engineers Local 138,* 293 F.2d 187, 192 (2d Cir. 1961).

there.[12] Toward the end of her visit, Flores saw and greeted Store Manager Mike Decker, handed him a copy of the document or documents she had been distributing, and left the store without incident.

Two days later, Flores returned to store 124 at around 11:30 a.m. in order to meet employees she missed 2 days earlier. She distributed her materials and spoke briefly with employees in the deli, bakery, and the meat departments at times when they were not waiting on customers. After nearly completing her business in the meat department area, Decker approached Flores and told her that she had to leave the store. Flores argued that she had a right to be in the store as the employee representative. Decker and Flores continued their discussion for the next 20 minutes or so in another location. All the while, Decker insisted that Flores had to leave the store. After she continued to insist on remaining, he finally threatened that he would call the police to have her removed from the store. When that failed to make any difference, Decker went to the customer service department to telephone the police. Flores followed. Before actually placing the call, he pleaded again for her to leave and she finally did.

Flores claims that she visited store 124 about twice a week in the period between January 18 and March 8 to speak with employees working there. Regardless of her veracity about the frequency of her visits, all agree that she returned to store 124 on March 8 between 11:30 a.m. and noon. [13] Purportedly, Flores went to the store that day to conduct an investigation necessary to determine if Local 99 could assist a terminated bakery department employee. While she talked with bakery employee Nancy Thomas about the terminated employee, the merchandise manager, Aaron Felix, approached and stood nearby staring at Flores. After 2 or 3 minutes, Flores asked Felix if she could be of help. Felix responded by telling Flores that she had no right to be there and that she would have to leave the store. With that Flores introduced herself and told Felix that she was there to look into an incident with an employee. Felix brushed her explanation aside and insisted that she leave the store.

Meanwhile, an unidentified woman approached as Felix and Flores spoke. The woman told Felix that she would speak with "Chuck" and walked away toward a room behind the bakery department. Shortly afterward, the woman returned and told Felix that Chuck had said he should call the police if Flores refused to leave the store. Flores continued to argue with Felix about her right to be in the store. Meanwhile, the woman reached for a phone and said she was going to call the police. Flores told her there was no need to do that. The threesome then proceeded to the produce department where they talked for a little longer and then toward the front of the store in the vicinity of the check-out registers. As they passed that area, Flores spoke to a cashier she knew, telling the cashier that they were kicking her out of the store. With that, Flores then left the store.

Gantt's Access Ban: Complaint paragraph 6(m) concerns a broad ban on union agents entering any Bashas' store. The ban supposedly grew out of reports Tom Swanson, the Food City vice president and general manager, received in the period from May 18 to 20 from several Food City store directors or merchandise managers (the second in command under the

[12] No effort was made to identify the documents Flores sought to distribute but I infer that they were likely the same documents Rivera-Sanchez distributed at store 64 2 weeks earlier.

[13] Again, I do not credit her assertion concerning the frequency of her visits. The inherent implication arising from her claims is that management only demanded that she leave the store only on two isolated occasions, January 18 and March 8, strikes me as highly improbable.

typical store hierarchy) about activities of individuals who claimed to be union agents or agents of an organization called "Hungry for Respect" (HFR).[14]

The reports received by Swanson indicated that groups of such individuals entered the Food City stores unannounced, distributed flyers and business cards to employees, and engaged employees in conversation about their cause, occasionally without regard to the employees' involvement with customers. Some of the individuals left the stores when requested by store managers, others did not.[15] The length of the activity in each store reportedly varied from as little as 10 minutes to as much as 30 minutes. Based on the reports Swanson received, these activities occurred that weekend at 27 separate stores (26 Food City and 1 Bashas), including store 124, the only organized store affected.

Shortly after the weekend, Swanson brought the store directors' reports about the store intrusions to the attention of the Bashas' executive committee established to deal with union issues. This committee decided to notify the UFCW and Local 99 that its agents were barred from all Bashas' stores even for their own private shopping needs. A letter to that effect went out on June 1, signed by Mike Gantt, Bashas' senior vice president of human resources. General Counsel Exhibit 70. He addressed the letter to James McLaughlin, president of Local 99, and George Wiszynski, the UFCW general counsel.

The relevant portion of Gantt's letter states:

> Your respective organizations have recently repeatedly violated Arizona law by sending UFCW representatives inside Bashas' stores to try and sell your union memberships and messaging to Bashas' employees. As you are well aware from last year's civil trespass lawsuit by Bashas' against the UFCW, Bashas' limits access to its stores to employees, legitimate shoppers, vendors and a limited number of charitable representatives. Your union salespeople do not qualify in any of those categories. Consequently, your organizations and their sales representatives are not allowed to go into or send union solicitors inside Bashas' stores. Because of the flagrant violations of Arizona law by your salespeople who have already trespassed on Bashas' controlled property, those UFCW salespersons' license and invitation to enter any Bashas' format (*i.e*., Food City, Bashas', AJ's, etc.) for any purpose, including shopping, is hereby permanently revoked.

The letter concludes with two paragraphs threatening more lawsuits. First it asserts if the two labor organizations do not instruct their agents to stop trespassing inside Bashas' stores of all formats immediately Bashas' will pursue "appropriate legal action." Second, the letter charges that unions agents with recording the auto license numbers of Bashas' employees in the

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[14] Bashas' officials allege that HFR amounts to a UFCW front used in the corporate campaign the UFCW waged against Bashas. HFR's DNA is little more than a curiosity for purposes of this proceeding. General Counsel and Charging Party objected to testimony by Swanson reports from the store managers as hearsay. I did not admit the testimony for the truth the store director's purported various reports that union agents entered the stores in groups and spoke to employees actively engaged in work on Bashas' retail selling floors. Instead, I admitted the testimony solely to explain the basis, whether true or not, upon which Bashas later banned union agents from its stores for any purpose.

[15] Company officials regard individuals who refuse to leave a store when requested as trespassers. Store supervisors have instructions to call police to remove persons who ignore repeated requests to leave a store. Police assistance was not sought in connection with the activity that occurred on May 18.

Company's parking lots. For this alleged conduct, Gantt's letter asserts that "the UFCW may find itself the target of (a class action lawsuit)."

Also on June 1, 2006, Bashas' filed a lawsuit against Local 99 in the Arizona Superior Court. In this lawsuit, Bashas' alleged in part that "the Union, through its agents trespassed and engaged in other unlawful conduct at store 64 and elsewhere." *Bashas*', 352 NLRB 391, 396 (2008). Allegations made in the complaint filed in this lawsuit and in subsequent pleadings before the court and the NLRB provided the factual basis for Judge Kocol to conclude in his decision issued on October 24, 2007, that Bashas had withdrawn recognition from Local 99 as the representative of employees at the former ASI and ABCO stores.[16]

McLaughlin responded to Gantt on June 14, 2007. McLaughlin's letter states:

> As the exclusive bargaining representative of the employees at nine of the stores operated by Bashas' Inc. in Arizona, UFCW Local 99 has certain rights of access to the stores under existing law and pursuant to the terms and conditions of the expired collective bargaining agreements and practices applicable at the stores. Although Bashas' has withdrawn recognition from Local 99, the National Labor Relations Board's General Counsel has determined that Bashas' withdrawal of recognition violates federal labor law. Local 99 has no intention of waiving any of its rights or foregoing its responsibilities as the bargaining agent of the employees in the nine stores while the unfair labor practice proceeding against Bashas' is litigated.
>
> With regard to your allegation that UFCW representatives have trespassed on Bashas' property in violation of Arizona law, please be advised that the union respects your company's legitimate property interests and has no intention to violate Arizona trespass law. In the future, if you believe that UFCW representatives have trespassed on company property, please contact me and I will attempt to resolve any legitimate concerns.

General Counsel Exhibit 71.

Gantt replied to McLaughlin's letter on June 21. His letter goes in to greater detail concerning the alleged conduct that occurred over the May weekend. Gantt's June 21 letter states:

> Despite your assurances, the Union has not acted in recent months as if it respected Bashas' property rights at those stores you are seeking to organize. There have been numerous instances of your organizers entering those stores, not as customers, but for the purpose of engaging in disruptive behavior, interrupting employees at work, taking photographs and videos, violating our solicitation/distribution policies, and trying to initiate confrontations with our managers and members. We tolerated that behavior until it became repetitive, and then we began asking the organizers to leave the stores or be considered trespassers, but even that action failed to curb the intrusive conduct. That is why, in our June 1 letter, Bashas' withdrew, from all UFCW professional organizers, any license or invitation to shop in our stores. Further violations of our rights and policies will lead to court action. If, as you say, the Union will instruct its organizers to respect

[16] Ultimately, Bashas' and Local 99 entered into a stipulation that provided for the dismissal of the state court complaint. As seen below, however, Bashas later filed a new and more expansive state complaint.

> Bashas' property rights, and we see no further repetition of the objectionable conduct, we will reconsider our decision regarding your organizers' ability to shop in our stores.

General Counsel Exhibit 72.

On July 3, McLaughlin's replied to the charges in Gantt's June 21 letter. In his latest letter, McLaughlin charged that Gantt's last letter contained a number of "incorrect assertions" and failed to address the issues he raised earlier. The fourth paragraph of McLaughlin's letter zeros in on Local 99's position concerning its right to access the stores. It states:

> [Y]our ambiguously worded [June 21] letter continues to accuse UFCW representatives of trespassing on Bashas' property. To the best of my knowledge, these accusations are untrue. Furthermore, as I stated in my previous letter to you, UFCW Local 99 has a right under law and under the terms and conditions of the expired collective bargaining agreements to access those Bashas stores whose members are represented by UFCW Local 99. In fact, it is Bashas' wholesale refusal to permit UFCW representatives in it stores that is unlawful.

General Counsel Exhibit 73.

b. The pleadings

Complaint paragraph 6(a) alleges that Respondent's agents violated Section 8(a)(1) by ordering a union agent out of store 64 in Phoenix on December 29, 2006, by threatening to call the police if the union agent refused to leave, and by refusing the union agent's request for limited store access. Respondent denied each of these complaint store 64 allegations. **Complaint paragraphs 6(b) and (c)** allege that Respondent's agents independently violated Section 8(a)(1) by ordering a union representative from store 124 in Yuma, Arizona, on January 18, and March 8, 2007, respectively, and by threatening to call police if the union agent refused to leave. **Complaint paragraph 6(m)** alleges that that Mike Gantt, Respondent's senior vice president of human resources, in a letter dated June 1, 2008, banned union agents from all Bashas' stores in violation of Section 8(a)(1) of the Act. Respondent's answer denies all of these 8(a)(1) allegations.

In **complaint paragraphs 9(c), (d), and (e)**, the General Counsel alleges that Respondent's conduct described in **complaint paragraphs 6(a), (b), (c), and (m)** also violated Section 8(a)(5) because Respondent failed to provide Local 99 with prior notice and an opportunity to bargain concerning access, a mandatory subject of bargaining. Respondent answer admits that the question of store access by union agent's is a mandatory subject of bargaining and that it did not give prior notice before expelling the union agents from its organized stores "because the Union had not asked to bargain over such access, and the Union's unannounced and un-ratified entry into certain Bashas' stores to interfere with working employees' (sic) on the selling floor for the purpose of conducting union business was inconsistent with the parties' 13-year past practice."

c. Argument, analysis, and conclusions

In *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956), the Supreme Court articulated the distinction between an employee's right to access his employer's property and the right of a nonemployee union organizer to access an employer's property. *Babcock & Wilcox* held that employers may lawfully deny access to their property and the workplace to nonemployee union agents to pursue organizational activities so long as "reasonable efforts by the union through

other available channels of communication" would enable them to reach employees with the union's message. Id. at 112. Years later, the Board developed and used a "balancing test" which weighed the impairment of employee Section 7 rights against the infringement on an employer's property rights in situations where nonemployee union agents sought access to an employer's property otherwise open to the public to deliver the union's message in an organizing campaign. *Jean Country*, 291 NLRB 11 (1988). In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Supreme Court rejected the Board's *Jean Country* test and reaffirmed its adherence to *Babcock & Wilcox*.

Lechmere shields only nondiscriminatory prohibitions against nonemployee access. In this case, the General Counsel and Charging Party made no attempt to establish that Bashas permits access to its stores by other similarly-situated outsiders while barring access by union agents. Instead, the General Counsel appears to advance a notion that Local 99 has a broad right to access the employees it represents in Bashas' organized stores while at work by reason of its status as the collective-bargaining representative.[17] Charging Party agrees but its brief places more emphasis on its contention that past practice supports Local 99's right of access to the organized stores. The General Counsel's brief agrees but seems to place less emphasis on the past practice argument.

Although *Babcock & Wilcox* and *Lechmere* dealt directly with a union's organizational activities, the reach of Section 7 extends to the representational functions that unions perform. See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). In *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), enfd. 778 F.2d 49 (1st Cir. 1985), the Board recognized that Section 7 protects employees' right to responsible union representation to the degree that, in certain limited instances, their employer's private property interests must yield to onsite access by nonemployee union agents.

In *Holyoke,* the union sought access to the employer's premises so its experts could perform technical measurements and studies that the union felt it needed to perform its representational duties. The ALJ equated the union's access request to a request for relevant information governed by the Supreme Court's *Truitt* and *Acme Industrial* decisions[18] and issued a recommended order requiring the employer to grant the union access.

On appeal, the Board only partially agreed with the ALJ's analogy. Importantly, it recognized that a union's request for access to the employer's property to independently obtain relevant information concerning employees it represented complicated the ordinary access question. The Board resolved this complication this way:

> We agree with the Respondent's contention that an employer's right to control its property is a factor that must be weighed in analyzing whether an outside union representative should be afforded access to an employer's property. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). Thus, we disagree with the judge's analysis insofar as it finds that a request for access is tantamount to a request for information; that is, the union is entitled to access if it is shown that the information sought is relevant to the union's proper performance of its representation duties. While the presence of a union

[17] Thus, General Counsel's brief states that a "union-represented employee has a Section 7 right to be contacted and observed by union representatives on the employer's property." GC Br. 14.

[18] *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

> representative on the employer's premises may be relevant to the union's performance of its representative duties, we disagree that that alone, *ipso facto*, obligates an employer to open its doors. Rather, each of two conflicting rights must be accommodated. *Fafnir Bearing Co. v. NLRB*, 362 F.2d 716 (2d Cir. 1966). First, there is the right of employees to be responsibly represented by the labor organization of their choice and, second, there is the right of the employer to control its property and ensure that its operations are not interfered with. As noted by the Supreme Court in *Babcock & Wilcox*, supra, 351 U.S. at 112, the Government protects employee rights as well as property rights, and "[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."
>
> Thus, we are constrained to balance the employer's property rights against the employees' right to proper representation. *Where it is found that responsible representation of employees' can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end. However, the access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer's operations.* On the other hand, where it is found that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access. [Emphasis added.]

Id. at 1370. Likewise, in *Brown Shoe Co. v. NLRB*, 33 F.3d 1019, 1022 (8th Cir. 1994), a similar access case, the court recognized that even though the standard of relevance in information-request cases under *Truitt* and *Acme Industrial* is similar to that used for discovery purposes, when the information sought involves an outsider's access to an employer's property, "closer scrutiny may be justified."

The limited nature of the access to the employer's private property provided by *Holyoke* became apparent with the Board's decision the following year in *Hercules Inc*., 281 NLRB 961 (1986). In *Hercules*, the union sought access to the employer's property for the purpose of investigating accidents, conducting health and safety inspections, and testing for the presence of hazardous fumes. The ALJ found the employer unlawfully denied access to the union and recommended that the employer be ordered to allow the employee representative access to its property "without limitation or condition." The Board refused to adopt that sweeping remedy. Although it agreed that the union was entitled to access for the reasons stated, the Board, citing *Holyoke*, limited the union's access to reasonable periods at reasonable times that would least likely disrupt the employer's operations. Impliedly, the Board's reasonableness limits required a mutual agreement on the time, place, and manner that would govern plant visits by union agents.

Holyoke, as clarified by *Hercules*, remains viable and unchanged to this day. *Nestle Purina Petcare Co.*, 347 NLRB 891 (2006). In *Nestle Purina*, the union, which already had contractual access rights that permitted its agents to meet with employees at locations off the plant floor, sought access to the work areas in the employer's warehouse to evaluate, by means of time and motion studies, changes in the duties of forklift drivers that produced several employee complaints and grievances. As explained in *Nestle*, the General Counsel has the burden of establishing the relevance of the information sought by the union representative's request for access. If the General Counsel satisfies that burden, the employer is legally obliged to grant reasonable access for the stated purpose or show that the bargaining representative could obtain the requested information by some means other than access to its property.

Here, the General Counsel and the Charging Party, in effect, argue that the unannounced intrusions by Rivera-Sanchez and Flores at stores 64 and 124 were justified because Local 99 has a right of access to Bashas' private property grounded merely on its representative status at those stores. In support, the General Counsel and the Charging Party rely primarily on *New Surfside Nursing Home,* 330 NLRB 1146 (2000); *C.C.E., Inc.*, 318 NLRB 977, 978 (1995); *CDK Contracting Co.*, 308 NLRB 1117 (1992); *Wolgast Corp*., 334 NLRB 203 (2001), enfd. 349 F.3d 250, (6th Cir. 2003). None of these cases support the broad holding that the General Counsel and the Charging Party seek here.

CDK and *Wolgast* are easily distinguishable to the situation here. In both cases the Board found a general contractor violated Section 8(a)(1) of the Act by prohibiting nonemployee union agents who represented employees of subcontractors working on a common jobsite access for representational purposes. The contracts the unions maintained for the subcontractors contained clauses permitting union agents to access the jobs where the employees worked. The *Wolgast* decision relied on the *CDK* decision. In *CDK*, the Board held that the general contractor could not establish an "unreasonable or discriminatory" access rule that completely overrode the contractual access clause. At the same time, the Board noted specifically that it would not preclude the general contractor from including a reasonable and nondiscriminatory escort requirement applicable to the charging union in its job-access rules. *CDK Contracting*, above at 1117 fn. 1.

Counsel for General Counsel and the Charging Party, in essence, rely on isolated dicta in *New Surfside* and *C.C.E* as support for the unannounced intrusions by Rivera-Sanchez and Flores. However, a careful examination shows that both of those cases rest solidly on well-established *Holyoke* principles. Neither of the two cases expands *Holyoke* beyond its original scope nor do they seek to establish new and different access principles.

In *New Surfside*, the ALJ found that the union had made a number of information requests for purpose of collective-bargaining negotiations for an agreement that expired some 8 years earlier. Those requests were largely ignored by the employer. Finally, the union made a written, advance request for an agent to visit the nursing home grounded on an access provision on an expired collective-bargaining agreement that the Board earlier found had survived the expiration of the agreement. The union received no response but its agent was denied access when he attempted to enter the nursing home on the appointed day. Over the course of the next 2-plus months, the union made two added requests for access. The union explained that "access was necessary in order for [union] representatives to observe the work processes of people performing bargaining unit work." The employer again refused access saying that it did not have to grant access to anybody.

At the ensuing NLRB hearing, the union agent elaborated on the union's need for access to observe the represented employees at work. He explained that: "[T]he Union needed to have someone on site, who understood the industry, to observe whether the jobs were done in a way [the union agent] might expect and understand, and to see if there were safety problems. The Union needed to see how the jobs were actually performed so that it could translate those findings into contract negotiations, to such matters as whether the pay rate reasonably related to the duties performed and how the duties compared with those of other employees in the industry." Based on this explanation, the Board explicitly held that the *Holyoke* principles applied and ordered the employer to grant the type of limited access it permits. Above at 1146 fn. 1. Rather than recognizing a general Section 7 right for employees to be contacted and observed by their union representatives on their employer's property as the General Counsel and the charging party claim, *New Surfside* merely held that the union succeeded in meeting the

standard for access established by *Holyoke* and, impliedly, that the employer had failed to establish that the union could obtain the information sought by an onsite visit elsewhere.

The *CCE* case also involved an employer's denial of a union representative's request for access while negotiations for an initial contract were underway to observe the employer's operations. After the parties had agreed on a considerable amount of contract language, the union agent requested access in order to observe the various skill levels required to perform bargaining unit work (the production of funeral coaches and limousines) that involved all manner of tools utilized in several different departments, and to inspect possible health and safety problem areas. The information gained from observing the work, the union argued, would permit it to better evaluate the employer's economic offer. *C.C.E.*, 318 NLRB at 979. The ALJ found a violation but left doubt as to whether he applied *Holyoke* or an earlier case (*Winonea Industries*, 257 NLRB 695 (1981)) grounded on the duty-to-furnish-information principles that the Board eschewed in *Holyoke*. Accordingly, the Board specifically applied *Holyoke* in reaching its conclusion that the employer violated the Act by refusing access. Above at 977. The Board panel rejected the employer's defense grounded on its confidential, proprietary and trade secret information because of evidence showing it had given tours to other outsiders. Id. at 977. Likewise, the Board rejected the employer's claim that the union's requests were not limited "in terms of time or scope." On this point, the Board found the union's requests "were sufficiently specific to fall within the limited right of union access recognized in *Holyoke*, supra." Id. at fn. 3.

Even Member Browning's concurring opinion in the *C.C.E.* case sheds light on the rationale for my conclusion here that Local 99 has no general right to enter Respondent's supermarkets in order to observe employees working. Although she agreed with her colleagues about the outcome, she opined that "the *Holyoke* standard is unduly restrictive of a union's right of access in circumstances where it already represents the employer's employees." As she saw it, the employee's exclusive representative "stands in the shoes of the employees" and therefore its "right to enter the employer's premises can be limited only to the same extent that an employer may limit its employees' right to engage in Section 7 activity on its premises." Plainly, Member Browning recognized that a union's status as the exclusive employee representative does not come with any ancillary right of access to the employer's premises where the represented employees work.

As the law now stands, the *Holyoke* balancing test applies in cases that present questions as to whether an employer may lawfully exclude from its premises agents of a union that serves as the exclusive employee representative. Applying *Holyoke* here, I find that the General Counsel failed to prove complaint paragraphs 6(a), (b), and (c) for several reasons.

First, no case that purports to apply *Holyoke* has permitted union agents to access to an employer's premises completely unannounced anytime they please.

Second, the General Counsel failed to establish that Rivera-Sanchez and Flores sought any information necessary for representational purposes at all during the December 29 and January 18 store visits. Instead, the two union representatives acknowledged that they entered the stores to distribute union literature. In fact, both glibly admitted that they distributed their materials to employees at their workstations during their working time on the sales floor. Bashas' work rules (R Exh. 47: 31) prohibit the distribution of literature by its own employees during their work time on the sales floor. Since *Stoddard-Quirk*, 138 NLRB 615 (1962), the Board has treated rules barring worktime distribution of materials in work areas as lawful. Moreover, in *Lechmere*, Justice Thomas, writing for the majority, observed: "As a rule . . . an employer cannot be compelled to allow distribution of union literature by nonemployee

organizers on his property." *Lechmere*, 502 U.S. 533. Hence, despite this seminal precedent, the General Counsel and the Charging Party seem to be arguing for a proposition that would entitle union representatives to enter an employer's premises unannounced for the purpose of distributing information in work areas during worktime. Neither provided a reasoned rationale rooted in precedent for according nonemployee union agents access rights superior even to those enjoyed by the employer's represented employees.[19]

Third, as to Flores' March 8 unannounced visit to store 124, I find the evidence proffered by the General Counsel far too insufficient to justify her access on that date. Flores' explanation for entering store 124 that day began and ended with her bare claim that she went to the store to speak with other bakery employees about the termination of a coworker. Nothing in this vague assertion serves to explain the necessity for an onsite visit with employees at work or the need to observe store operations as a part of the Union's decision-making process as to this termination. In addition, when confronted by Merchandise Manager Felix, Flores still made no effort to explain her need for access. Instead, she asserted, in effect, that she had an unfettered right to enter the store and speak with employees solely by reason of her status as their union representative. If Local 99 had reason to believe (or even suspect) that some condition in store 124 could affect its determination as to whether it should assist the terminated employee in a representative capacity, then it initially, and the General Counsel subsequently, had the burden of explaining those reasons in a manner that would allow a rational determination as to whether the Employer's right to control its premises had to yield to the union's right to obtain necessary information by onsite observations.

In the absence of a legally sufficient justification for access by the union representatives, Respondent had a right to exclude them from its private property and to seek the assistance of police authorities to have them removed when they refused to leave as requested. *MetFab, Inc.*, 344 NLRB 215, 221 (2005) (employer did not violate the Act by calling police to investigate whether union picketing and handbilling encroached on its private property or impeded traffic).

For these reasons, I will recommend dismissal of **complaint paragraphs 6(a), (b), and (c)** including the threats purportedly made in front of employees to call police authorities if the union agents failed to obey the lawful management directives to leave the store.

I will further recommend the dismissal of **complaint paragraph 9(d)** to the extent that it alleges Respondent violated Section 8(a)(5) by excluding Rivera-Sanchez and Flores from its stores as described in **complaint paragraphs 6(a)–(c)**. The General Counsel and the Charging Party argue that Bashas' unilaterally altered a longstanding past practice of store access by union representatives at the organized stores.

The very limited evidence of past practice amounts to this: For 6 months to a year after Bashas' acquired the seven ASI stores in 1993, union agents engaged in onsite visits with employees at those stores. The basis for inferring that Bashas' acquiesced in these visits is

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[19] For example, the General Counsel proposed that I include the following paragraph in the notice to employees as a part of the remedy for this alleged violation:

> Your union representatives have the right to speak to you while you are working in the public areas of our stores as long as you continue to perform your job competently, or when you are on a break.

GC Br. 137.

grounded primarily on the fact that there is no evidence that the Employer objected to these visits or sought to eject the union agents. Following that period, the evidence of in-store visits by union agents is scant to nonexistent over the next 12 or 13 years until 2006 when union agents began visiting employees in the stores to learn their reaction to the Company's announcement about coming changes in the health care program. Meanwhile, the parties engaged in extensive collective bargaining from 1993 until 2002 which included unsuccessful attempts to conclude the terms of an access provision. Finally, by June 2006, Bashas' had filed its first State court action for trespass against the Union. I find no sustainable past practice existed on which to predicate an 8(a)(5) allegation.

Turning next to **complaint paragraph 6(m)**, I find it reasonable to infer that Gantt's letter of June 1 and his subsequent correspondence with McLaughlin did nothing more than ban access to Bashas stores for purposes of engaging in ordinary solicitation and distribution activities that are organizational, rather than representational, in character. But even if one reads the June 1 letter as a ban on access to the stores where Local 99 represents Bashas' employees, it is still lawful. An employer may lawfully bar nonemployee union agents from *any* of its properties absent a proven need and prior request for access grounded on its employees' Section 7 rights.

The arguments by the General Counsel and the Charging Party that Gantt's June 1 letter violates Section 8(a)(1) or (5) because of its susceptibility to an interpretation that it bars non-employee union agents from access to the eight stores where it represents employees lacks merit. A union's right of access to an employer's private property does not flow automatically from certification or recognition as the employees' bargaining agent. Member Browning's concurring opinion in *C.C.E.*, supra, advocated that position but it is not presently the law.

Reading the *Babcock & Wilcox* and *Lechmere* cases together establishes that, absent a special need driven by the inaccessibility of employees, an employer may bar union agents from its property for organizational purposes regardless of whether the union represents the employer's employees or not. Employees of ordinary American supermarkets have never been considered inaccessible under *Babcock & Wilcox*. Therefore, union organizers have no legal basis to engage in organizing activity within the bounds of a retail supermarket absent an agreement or some mutually agreed-upon practice with the person who holds a sufficient property interest where the supermarket is located to determine who may access the property and who may not. *Lechmere*, supra; *Johnson & Hardin Co*., 305 NLRB 690 (1991).

Gnatt's June 1 letter only addresses unauthorized intrusions by union agents on its property. It does not address any pending legitimate request for access needed to perform representational functions. No evidence establishes that Local 99 had a pending request for access at the time of Gantt's letter or, frankly, any time thereafter. I find the June 1 letter bars access by union agents because Bashas' perceived that they abused the general, but limited, access privilege a supermarket operator grants to the public in general.

As can be seen, McLaughlin's letters both argue that union agents have a right to access the organized stores on the basis of the expired collective-bargaining agreements at those stores. Neither the General Counsel nor the Charging Party advanced such a theory presumably because of the lack of evidence that Bashas' ever adopted the terms of their predecessors' collective-bargaining agreements.

McLaughlin's June 14 letter also references "practices applicable at the stores" as a basis for store access by union agents. The General Counsel and the Charging Party both argue that past practice permitted union agent access at the organized stores so that the

ambiguity as to whether the ban in Gantt's letter applied to those eight stores permitted the conclusion that Respondent unilaterally altered the past practice in violation of the Act.

Past practice has been defined classically as "a course of conduct that is the understood and accepted way of doing things over an extended period of time, and thus, mutually binding and enforceable." Richard Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 Michigan Law Review No. 7 (1961), p. 1017. To be sure, store access by union agents is a mandatory subject of bargaining. *Ernst Home Centers Inc.*, 308 NLRB 848, 849 (1992); *Smyth Mfg. Co*., 247 NLRB 1139, 1168 (1980); *Granite City Steel Co*., 167 NLRB 310, 315 (1967). But regardless of the formulation applied in determining whether a past practice existed, I am not satisfied that the evidence concerning store access here would be sufficient to find Section 8(a)(5) has been violated by Gantt's ban.

Unquestionably, the parties' accepted practices can serve to establish a new right never before agreed upon. *Riverside Cement Co*., 296 NLRB 840, 841 (1989). But the sporadic, unilateral conduct by one of the parties does not rise to the level of a practice binding on both. It is of considerable significance that even the limited evidence of access to the organized stores by union agents over the years fails to clearly establish the degree of management's knowledge about union agent incursions into the stores and for what purpose. Even if credited, Flores' testimony that she shopped at Store 124 from time to time makes here testimony regarding the frequency of her visits to that store murky and inconclusive for purposes of any finding about past practices. Therefore, a finding on this record that Bashas' acquiesced in store access by union agents over the years to the degree necessary to conclude that a practice of that sort existed would be unwarranted.

Likewise, the lengthy gap in the evidence of access from 1993–1994 to 2006 mitigates heavily against a finding that a past practice existed here that would implicate an 8(a)(5) bargaining duty. Moreover, even the bargaining about store access that occurred in the 1998–1999 period strikes me as designed to establish initially the time, place, and manner rules applicable to union agent access rather than as an effort to alter some existing access practice. Finally, access by union agents to the organized stores occurred at such random and infrequent times over the years as to preclude a finding that it was an understood and accepted way of doing things. Hence, I find the evidence insufficient to find that a binding past practice of store access by union agents existed here.[20]

Accordingly, I recommend dismissal of all complaint allegations pertaining to Gantt's June 2007 letters to the UFCW and Local 99 barring its agents from entering Bashas' stores.

2. The July 2007 pay rate increase

Complaint paragraphs 6(n)(1)–(4) alleges that Respondent violated Section 8(a)(1) in June 2007 when its human resources vice president, Gantt: (1) disparaged and undermined Local 99 by blaming it for causing Respondent to withhold current and future wage increases

[20] The Charging Party cites *ATC/Vancom*, 2004 WL 1047396, in support of its past practice argument. That case is not binding precedent as no party filed exceptions to the ALJ's decision. The case is also factually distinguishable. The ALJ concluded that the past practice in that case resulted from the parties' adherence to a bilateral oral agreement about access for 2 years. The ALJ held that the employer violated Sec. 8(a)(5) when a new shop manager unilaterally revoked the practice established under the oral agreement.

and other benefits from unit employees;[21] (2) threatened employees that Respondent would withhold future wage increases and other benefits if Local 99 refused to participate in a representation election; and (3) solicited unit employees to decertify the Local 99.

Complaint paragraph 7(i) alleges Respondent violated Section 8(a)(3) of the Act by granting a wage increase on July 17, 2007, "to all of its employees" except the 170 or so unit employees. Complaint paragraph 9 alleges that Respondent violated Section 8(a)(5) of the Act when it refused Local 99's request to bargain about the July 17 wage increase and granted the wage increase unilaterally.

a. Relevant facts

Over the year since acquiring the ASI stores in 1993, Bashas has made a number of changes in employee pay and benefits on a companywide basis. After it acquired the ABCO stores in 2001, Bashas' continued to adjust its wages and benefits on a companywide basis. *Bashas'*, 352 NLRB 391, 393–395 (2008). As to pay raises, pay rate increases, and cost of living adjustments, Bashas' concedes that in the 13-year period from 1993 to 2006 the represented and unrepresented employees were treated the same. R Br. 195.

Discord over that practice of adjusting wages and benefits first occurred in 2006 when Bashas' rejected Local 99's demand to bargain over announced health plan changes and unilaterally implemented changes that were, in part, detrimental to employees. Thus, the 2006 changes included the first-ever requirement that employees pay a portion of their health insurance premium for the better of Bashas' two plans.[22]

Judge Kocol found that no party claimed in the prior proceeding that negotiations ended in 2002 because an impasse had been reached. Instead, he cited the testimony of Paul Rubin, Local 99's secretary-treasurer, that "negotiations took a break" and the Union continued to monitor the wage increases and changes that Bashas' made to its health insurance and pension plans to assure that they matched what the Union achieved in its contracts with other unionized employers in the area. Above at 394

In July 2007, Bashas' departed from its historical practice of making wage adjustments on a companywide basis. Effective July 1, Bashas' increased the pay rate for its "top-of-the-scale" employees working in its unorganized stores by 25 cents per hour. Gantt informed the store directors at the eight organized stores about this increase in a memo dated June 29. That memo explains that the increase would not be given to comparable employees at the organized stores because counsel had advised that "until the pending NLRB charges filed by the UFCW are resolved" the Company could not grant the increases to the represented employees. Bashas' never notified Local 99 about its decision to exclude the workers it represented from the otherwise companywide increase.

Gantt instructed the store directors at the organized stores to meet with the affected employees to "help them to understand that our hands are tied currently because of the

[21] The "disparaged" and "undermined" allegations are separately plead in pars. 6(n)(1) and (4). Both allegations implicate identical facts. My finding below treats the allegation in par. 6(n)(4) as subsumed within par. 6(n)(1) and that they need not be treated separately.

[22] The significance of this change cannot be overstated. The complaint in this case raised no issues about health insurance directly but nearly all of the employee witnesses indicated that this action on the part of Bashas' management sparked considerable interest in unionization.

intervention of a union that after four years of total neglect has suddenly risen from the depths to claim jurisdiction over them." Bashas' provided its store directors at the organized stores with a "talking points" memo to use in explaining the reasons for withholding the pay rate increases from the represented employees.[23] General Counsel Exhibit 76.

The store directors read the talking points to the employees in July.[24] The talking points memo informed employees about the pay rate adjustments that had been made but states that the change did not "apply to this store and the others that are involved in the current matter before the National Labor Relations Board." The memo explained Bashas' reasons for excluding the organized stores this way:

> The United Food & Commercial Workers Union represented employees in these few stores before Bashas' bought them. After we took over and could not agree on a new labor contract with the union, they stopped acting on behalf of our members (Bashas' term for employees) for more than four years. During those years, we made adjustments to wages, benefits, and other employment terms and never heard a peep from the union.
>
> When Bashas' amended its medical insurance plan a while ago, the union filed a claim with the Labor Board, arguing that Bashas' was not legally entitled to make ANY changes in your terms and conditions of employment without first negotiating with the union. Bashas' disagrees and points out that the union actually abandoned these stores years ago. That matter is going to trial before an Administrative Law Judge in July. We don't know how long this trial will last or what the result will be. As you know, we asked the union to settle this whole mess by allowing our members to vote for or against union representation, but the union refused.
>
> Our lawyers have told us that if we make any more changes in your employment terms before this matter is resolved, the union could file additional charges with the Labor Board. That even applies to wage increases, because the union might argue that we should have negotiated that issue with them and allowed them to take credit for any increases. Even if the union were to say it has no objection to any wage increases, our lawyers tell us we still couldn't do it. Why? Because, if the Board rules that the union does represent you, Bashas' would have to negotiate a complete contract with the union, and wages would just be one part of the give and take in negotiations. So we can't move ahead on just one piece of the puzzle.

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[23] This conduct overlapped the period leading up to the hearing in the previously cited prior case. The "NLRB charges" Gantt alluded to refers to the complaint in that proceeding. The complaint in that matter alleged that Bashas' violated Sec. 8(a)(5) of the Act by refusing to notify and bargain with Local 99 about the June 2006 health insurance changes. It also alleged that Bashas withdrew its recognition of Local 99. For that allegation, the General Counsel relied, in part, on a trespass allegation Bashas' made against Local 99 in an action it brought before the Arizona Superior Court on June 1, 2006, that asserted Local 99 "does not represent Bashas' employees." The Board ultimately adopted Judge Kocol's dismissal of health insurance change allegation on 10(b) grounds but found merit to the withdrawal of recognition allegation.

[24] The parties stipulated that the store directors read the talking points to employees in "late July." Tr. 2392. Based on the McLaughlin/Proulx exchange of correspondence discussed below, I am inclined to believe that the reading occurred somewhat earlier that month.

> Some of you might ask: How come Bashas' could start charging us more for health insurance, but can't give us the raise that everyone else is getting? The answer is that, when we amended the insurance plan, we did not believe there was a union in the picture, but now the union is arguing that it has control over all your terms and conditions of employment.
>
> Once the Labor Board has finally ruled on whether the union continues to represent you —however it comes out—we will do whatever the law allows to treat you fairly, like our other members, on matters of wages and other benefits. We just cannot tell you now what that means because the fact that this legal dispute is still pending and because, if the union wins, we will have to enter into contract negotiations with them over all your terms and conditions of employment. There's no telling how that will turn out. You might end up with more—or less—than you have now. We are sorry for this situation, but we must follow our lawyers' advice. We'll keep you posted on what happens before the Labor Board.

On July 17, Local 99 President McLaughlin sent a letter to Bashas' President Proulx demanding that Bashas' grant the pay increase to the employees represented by Local 99. McLaughlin branded as untrue the claim that Local 99 might file added NLRB charges if the represented employees received the pay increase.[25]

Proulx rejected McLaughlin's demand in a letter sent the following day. That letter stated that the pending NLRB litigation led Bashas to believe that "the UFCW has waived any rights it may have once had to bargain over the issue raised in your July 17 letter." The letter also asserted that McLaughlin's letter did not appear to have changed any of the demands that led to a bargaining impasse in 2002. Proulx assured McLaughlin that if the NLRB ruled that Bashas had an obligation to bargain with Local 99 it would fulfill its obligations but it would not "prematurely" grant the Union's demands for concessions before its right to make such demands had been legally established. Finally, he told McLaughlin that any agreement would have to result from the give and take at the bargaining table and an evaluation of the cost and propriety of all proposals.

McLaughlin responded in a letter dated July 24. In it, he objected to Proulx's claim about a 2002 bargaining impasse, saying that until the July 18 letter neither party "has ever claimed in words or acts that there was a bargaining impasse." McLaughlin again demanded that the Local 99-represented employees immediately receive the pay rate increase implemented at the unorganized stores.

Judge Kocol issued his decision on October 10, 2007. Thereafter, Bashas granted the disputed rate increase to its represented employees. In the first week of November, it also made those employees whole with interest for withholding the pay increase until then.

b. Argument, analysis, and conclusions

The General Counsel's brief asserts generally that Gantt made "(n)umerous Section 8(a)(1) statements" throughout the talking points memo the store directors read to employees at the organized stores. However, General Counsel's brief only provides detailed argument

[25] McLaughlin's letter concluded with the added demand that Bashas reimburse the represented employees for the unilaterally imposed medical insurance premium that the Board dismissed on Sec. 10(b) grounds.

concerning the allegation that Bashas' blamed Local 99 for its own refusal to grant the July 1 pay rate increase to employees at the organized stores.

The General Counsel and Local 99 argue that Bashas violated Section 8(a)(3) by withholding the July 2007 pay rate increase from the unit employees. They argue that either the Board's *Wright Line* causation test or the *Great Dane* "inherently destructive" doctrine applies here. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), as modified by *Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994); *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

Both the General Counsel and the Charging Party rely on *Empire Pacific Industries,* 257 NLRB 1425 (1981), in support of the 8(a)(5) allegation. The Charging Party also cites this case for the proposition that Bashas independently violated Section 8(a)(1) "by granting the wage increase to non-represented employees." Although the case certainly says as much, the General Counsel's complaint does not contain an allegation that Bashas independently violated Section 8(a)(1) by implementing the July 2007 pay rate increase for the nonrepresented employees while refusing to bargain with Local 99 over that increase at the organized stores.

Bashas argues that all of the statements made in the talking points memo amount to protected speech under Section 8(c) and, therefore, they do not violate Section 8(a)(1). In addition, it argues that Section 10(b) bars consideration of the allegation in **complaint paragraph 6(n)(3)** that Gantt solicited employees to decertify Local 99 because no such allegation was ever made in a timely filed charge, no witnesses were presented in support of a decertification solicitation by Gantt, and none of Gantt's writings in evidence contain any reference to decertification. Respondent also argues that nothing in Gantt's talking points memo undermined the Union by blaming it for the withholding of the July 2007 pay rate changes from the represented employees.

In defense of the 8(a)(3) allegation, Respondent argues that its past history of granting companywide pay increases over the 13-year period following the acquisition of the ASI stores precludes a finding that union animus motivated the withholding of the pay rate increase in July 2007. It also argues that it withheld the pay rate increase for the legitimate business reasons of avoiding a legal liability, and in response to the Local 99's bargaining "tactics," i.e., withdrawing its permission for the Employer to deal directly with employees about employment conditions by filing failure to bargain charges in 2006 and 2007. Finally, Respondent argues that *Great Dane* is inapplicable because the withholding of the pay rate increase was "limited and temporary."

As to the 8(a)(5) allegation, Bashas contends that, absent a discriminatory motive, the law permits an employer to grant its unorganized employees wage increases at a time when its organized employees seek to bargain collectively through their representative. In addition, Bashas' argues that its refusal to grant the July 2007 rate increase "despite the Union's putative 'consent'" is lawful where the course of Local 99's conduct established that:

> (1) it was wholly inconsistent with the Union's prior litigation assertions that it would no longer consent to unilateral changes affecting the Represented Store employees; (2) it put Bashas' in an untenable position of not knowing whether to treat the Represented Store employees the same as other employees; and (3) it was a transparent ploy by the Union to cherry pick wage and benefit changes without ever having to ask for bargaining.

R Br. 200.

The 8(a)(1) allegations: The 8(a)(1) allegations in **complaint paragraph 6(n)** all relate to statements made in the talking points memo. The General Counsel failed to prove the allegation in **complaint paragraph 6(n)(3)** that Respondent solicited its organized employees to decertify Local 99. His brief does not separately address this allegation. The only evidence remotely connected to the allegation is the talking points statement that Bashas' offered to settle the pending unfair labor practice case "by allowing our members to vote for or against union representation, but the union refused." However, I find that statement insufficient support for an allegation that Respondent solicited unit employees to decertify their representative. Hence, I recommend dismissal of **complaint paragraph 6(n)(3)**.

I find the evidence supports the allegation in **complaint paragraph 6(n)(2)** that Respondent "threatened employees with further withholding of wage increases and other benefits." The talking points memo amounts to a self-serving collection of half-truths, misinformation, and omissions designed to dupe the listeners, i.e., the unit employees. The memo disregards the history of treating organized and unorganized employees alike when implementing periodic adjustments in pay and benefits from 1993 onward. The assertion that Local 99 and Bashas "would have to negotiate a complete contract" before granting any pay rate adjustment ignores well-established legal precedent that permits an employer to implement periodic benefit adjustments during ongoing negotiations for a complete agreement. See, e.g., *Stone Container*, 313 NLRB 336 (1993). Clearly the memo conveys the notion that, beginning with the July 2007 wage adjustment, Bashas would no longer make periodic, companywide adjustments in the wages and benefits of employees as it had historically done. Instead, Respondent told its organized employees that all future adjustments for them, whether Local 99 agreed to them or not, would be wrapped into the bargaining process that had already spanned 14 years. I find Respondent clearly threatened to alter its past method of making periodic changes in a manner that would be detrimental to the unit employees. Accordingly, I find merit to the allegation at **complaint paragraph 6(n)(2)**.

Bashas talking points memo also disparaged and undermined Local 99 as alleged in complaint paragraphs **6(n)(1) and (4)**. On its face, the memo contains a variety of bellicose phrases that add up to a disingenuous effort to pin the blame on Local 99 for its withholding of pay rate increases at the organized stores. After it first accused Local 99 of abandoning the bargaining units, it then contends that things changed when Bashas "amended" its health plan. The memo skips any mention of the fact that Local 99 asked to bargain about charging employees for a portion of their medical insurance premium and makes the sweeping charge that Local 99 had filed "a claim with the Labor Board, arguing that Bashas' was not legally entitled to make ANY changes . . . without first negotiating with the union" a situation the memo characterizes as "this whole mess."

Bashas bare-knuckle message to the unit employees reaches its zenith in the memo paragraph that announces it would not make "any more changes in your employment terms before this matter [the prior case] is resolved" because "the union could file additional charges." This even included July 2007 wage change "because the union might argue that we should have negotiated that issue with them and allowed them to take credit for any increases."

In sum, the memo provides ample evidence of disparagement designed to undermine the Union's standing before the employees it represents. Plainly, it blames Local 99 for its own refusal to grant the 2007 pay rate increase to the unit employees. It excuses its own failure to follow its lengthy practice of granting benefits on a companywide basis by blaming Local 99 and, to a lesser degree, the NLRB. Therefore, I find merit to the General Counsel's allegations the Bashas' violated Section 8(a)(1) by disparaging and undermining Local 99 in the July 2007

talking points memo read to the employees that union represents. *Aluminum Casting & Engineering Co*., 328 NLRB 8 (1999).

The 8(a)(3) allegation: I am also satisfied that the evidence supports the conclusion that Bashas' violated Section 8(a)(3) by withholding the July 2007 pay rate increase from unit employees for discriminatory reasons. In agreement with the General Counsel and the Charging Party, I find that Respondent's conduct regarding the July 2007 pay rate changes inherently destructive of employee rights as provided in the *Great Dane* case. The cases are remarkably similar. In *Great Dane*, the employer withheld accrued vacation payments from striking employees. Here, Respondent withheld a periodic wage adjustment historically granted on a companywide basis from unionized employees essentially in retaliation for the Local 99's pursuit of its legal right to bargain about changes in its medical insurance program and other alterations affecting the wages, hours, and working conditions of the employees it represents.

Even if this pay issue is not controlled by *Great Dane*, the record still supports the conclusion that Respondent withheld the pay rate adjustments for discriminatory reasons. In cases that turn on the question of motivation, the Board's *Wright Line* causation test first requires the General Counsel to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The General Counsel makes a showing of discriminatory motivation by proving protected activity, the employer's knowledge of that activity, and animus against protected activity. *North Carolina License Plate Agency #18*, 346 NLRB 293 (2006); *Best Plumbing Supply*, 310 NLRB 143 (1993). To meet the burden of proving its affirmative defense, an employer must do more than merely by showing that it had some legitimate reason for taking the adverse action; instead, it must show by a preponderance of the evidence that the action would have taken place even without the protected conduct. Id., 346 at 294; *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

General Counsel established the essential elements warranting an inference that the employee conduct protected by Section 7 motivated Bashas' to withhold the July 2007 pay rate increase from the unit employees. Section 7 protects employees' right to bargaining collectively through representatives of their own choosing. The unit employees had long been represented for collective-bargaining purposes by Local 99. The conduct of Local 99 in May 2006 seeking to bargain on behalf of those employees as their representative concerning the proposed changes in Bashas' medical plan amounts to protected activity imputed to the unit employees. As found in the prior case, Local 99 followed this request by further requests that Respondent bargain concerning changes made at certain of its stores that affected the terms and conditions of employment of the represented employees.

These activities led to the June 2006 trespass action in State court that served ultimately as the cornerstone for the Board's decision that Bashas' had effectively withdrawn recognition of Local 99 as the employee bargaining representative. In pursuit of a remedy for Bashas' reaction, Local 99 invoked the procedures of the Act to protect its status as the employee representative and to compel the employer to bargain over the health plan changes and other recent changes Bashas' made that adversely impacted unit employees. These actions by Local

99, also well known to Bashas', amount to further protected conduct imputable to unit employees.[26] Factually, this pay rate issue connects seamlessly to the prior NLRB case.

Only 3 weeks prior to the NLRB hearing on Local 99's charges, Bashas' announced the pay rate increase at issue here. In contrast to what it had been doing for the past 13 years, Bashas' refused to implement the increase at the organized stores and used the occasion to denigrate Local 99 in a message to the represented employees by telling them, in effect, it would not risk a demand to bargain over this and future pay increases for which Local 99 might attempt to claim "credit." On these facts, I find it reasonable to infer that Bashas' altered its longstanding practice of making such wage and benefit changes on a companywide basis and withheld the July 2007 pay rate increase from unit employees in retaliation for their protected activities, to wit, Local 99's attempts to bargain over several recent changes Respondent made that were detrimental to their terms and conditions of employment.

As General Counsel successfully met the initial burden of persuasion under *Wright Line*, the burden of persuasion shifted to Respondent to demonstrate that it would have withheld the 2007 pay rate increase from the unit employees even in the absence of the protected employee conduct. Bashas' admission that it applied compensation policies on a company-wide basis since acquiring the organized stores makes it nearly impossible for it to meet the required burden of persuasion under *Wright Line*. Worse yet, Bashas' also admits that it did not institute the pay increase for the unit employees "[b]ecause the Union had objected to Bashas' treating *all* of its retail stores the same with regard to wages and benefits, and because [the prior unfair labor practice cases] were set for trial beginning on July 24, 2007." Because these admissions are thoroughly consistent with the conclusion above about the retaliatory nature of withholding the pay rate increase from the unionized employees while granting them to the unrepresented employees, it would appear that Respondent could only meet its *Wright Line* burden by showing an applicable legal principle that would justify conduct of that character.

In its brief, Respondent explained that "Bashas' did not want to be trapped into a situation where it extended the system-wide wage increase to unionized employees only to later find itself bargaining over a new and complete labor contract with no flexibility on one of the most important components—wages." (R Br. 193.) Respondent argues that there are two legal justifications for the steps it took to avoid the trap it perceived.

First, citing *VOCA Corp.*, 329 NLRB 591 (1999), Respondent argues that the avoidance of legal liability justified withholding the 2007 pay rate increase to its represented employees. I find the *VOCA* case factually distinguishable from the situation here. In *VOCA*, the employer maintained a bonus payment program for its unrepresented employees but not its represented employees. After the represented employees voted to decertify the union, the employer

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[26] Respondent plays down the protected activity here by arguing that it is limited to the mere relationship between Local 99 and the represented employees that had existed for years. Therefore, Respondent asserts, "the key question for the Section 8(a)(3) *prima facie* analysis is whether there is any evidence that Bashas' withheld the wage increase *because of animus towards that relationship*." R. Br. 195. I disagree with that narrow view. This view would render the General Counsel's burden unnecessarily difficult in the cases involving a long-term relationship because of the stale character of the protected activity, i.e., the relationship of representation. The more rational view, in my judgment, is that each separate instance of activity by the representative on behalf of the represented employees is imputable to them so that disputes arising out of a particular activity could properly be evaluated in the context of relevant time without giving undue weight to the age of the relationship.

proposed to pay the bonus to the represented employees but delayed paying it to them for 2 months beyond the normal distribution time while it awaited the final outcome of the union's objections to a decertification election. The ALJ concluded that the employer violated Section 8(a)(3) by the delaying the bonus payment to the represented employees. The Board reversed. Finding that the union failed to consent to the payment, the Board held that the employer's continuing duty to bargain with the union until the conclusion of the decertification proceeding served as a *Wright Line* defense to the 8(a)(3) allegation. Here, of course, the Employer did the exact opposite. It withheld the 2007 pay rate increase normally granted to all employees from the unit employees even in the face of the Union's consent. Accordingly, I find the *Wright Line* defense Respondent fashioned from *VOCA* inapplicable here.

Second, Respondent argues it could legally withhold the 2007 pay rate change from unit employees in response to Local 99's bargaining tactics based on the Board's rationale in *KFMB Stations*, 349 NLRB 373 (2007). Bashas equates Local 99's failure to object to the periodic changes in employee terms and conditions of employment (presumably from 2006 back 13 or so years) it made on a companywide basis as equivalent to the union's contractual consent for the employer in *KFMB* to deal directly with its on-air talent in the negotiation of personal services contracts (PSC).

In *KFMB*, the union, following the expiration of the collective-bargaining agreement with PSC-consent provision, rescinded its permission for the employer to negotiate PSCs in order to pressure the employer for a successor agreement. When that occurred, KFMB reduced the pay of all talent employees without an existing PSC to union scale, a much lower rate. The ALJ found the pay cuts unlawful because they occurred during the course of collective bargaining for the purpose of undermining the union and were therefore "inherently destructive of Section 7 rights" under *Great Dane.* The Board reversed. It concluded the contractual direct-dealing provision involved a "permissive" subject of bargaining that either party could rescind at any time. Id. at 375. Hence, the Board found that the union's action rescinding the employer's authority to negotiate PSCs amounted to a valid defense for reducing the pay rates applicable to the talent employees to union scale.

Contrary to Bashas' argument, the situation here is not analogous to that in *KFMB*. There is no evidence in this case that Local 99 ever ceded carte-blanche authority for Bashas to deal directly with unit employees. At best, the evidence only shows that Local 99 merely acquiesced to the periodic beneficial adjustments Bashas chose to make on a companywide basis during the many years Local 99 sought to negotiate a collective-bargaining agreement. In this context, Local 99's attempt to intervene and bargain about the detrimental changes Bashas made to its medical insurance benefit in 2006 is not at all analogous to the situation in the *KFMB* case. Unlike the situation in *KFMB*, Bashas' practice of granting periodic wage and benefit changes on a companywide basis amounted to a mandatory subject of bargaining.

Accordingly, I conclude that Respondent failed to meet its *Wright Line* burden. For these reasons, I find Respondent violated Section 8(a)(3) when it withheld the 2007 pay rate increase from the unit employees.

The 8(a)(5) allegation: Respondent's 13-year history of making beneficial adjustments to its employee pay and benefit programs on a companywide basis amounted to a term and condition of employment. The Union acquiesced to these periodic adjustments over the years. However, no evidence was adduced in this case or, as far as I can tell, in the prior case that the Local 99 had a practice of acquiescing in changes detrimental to the unit employees. For this reason, I find Respondent had a legal obligation under this long-established practice to notify Local 99 and provide it with an opportunity to bargain before it made a detrimental change to the

wages, hours, and terms and conditions of employment of the unit employees, or withheld from them beneficial changes given to others. *NLRB v. Katz*, 369 U.S. 736 (1962). Respondent failed to comply with that legal duty by withholding the July 2007 pay rate increase from unit employees

Respondent's excuses for withholding the July 2007 pay rate adjustment from the represented employees are unconvincing.[27] Its charge that Local 99 engaged in some sort of underhanded bargaining tactic by requesting the implement of the July 2007 increase at the organized stores while insisting that Respondent bargain about the 2006 medical insurance changes ignores the realities that flow from the parties' failure to conclude a collective-bargaining agreement after such a protracted period of negotiations. And clearly these two changes are quantitatively quite different. Imposing a new requirement that employees pay part of their medical insurance premium has just the opposite economic impact on employees than an increase in their pay rate.

The timing and the content of the announcement to employees about the July 2007 pay-rate adjustment strongly supports the inference I have made that Bashas sought to retaliate against Local 99 for challenging its new policy of charging employees a portion of their medical insurance premiums in 2006, a challenge that gained the Union popular support among a number of Bashas' employees. The fact that Respondent still refused to extend the pay adjustment to the unit employees even after McLaughlin provided Local 99's written consent for its implementation at the organized stores reinforces that inference. By choosing this course, Bashas' acted at its own peril, gambling on the outcome of the prior case which it lost.

In the Board's view, the implementation of periodic adjustments of *discrete* aspects of the employees' compensation package (including pay rates and health plan changes) with the acquiescence of the bargaining agent during the course of contract negotiations essentially amounts to a continuation of the status quo rather than a violation of the Act. *Courier-Journal*, 342 NLRB 1093 (2004); *Brannan Sand & Gravel Co.*, 314 NLRB 282 (1994). The prior Board decision here reaffirmed Respondent's continuing legal duty to bargain with Local 99 concerning the wages, hours, and working conditions of unit employees. The effect of that decision meant that Respondent had a duty to notify and provide Local 99 with the opportunity to bargain about the planned July 2007 pay rate adjustment. Instead of complying with that duty, Respondent unilaterally departed from its historical practice of implementing periodic changes on a companywide basis and withheld the July 2007 adjustments from the represented employees. By doing so, Respondent violated Section 8(a)(5).

B. Issues Arising at Bashas' Unorganized Retail Markets

1. The allegations about the store 153 night crew

This section deals with the General Counsel's allegations that Respondent violated Section 8(a)(3) by taking certain disciplinary action, including warnings, suspensions, and transfers, directed at store 153 night crew employees Teresa Cano, Victor Cabrera, and Ruben Salazar. See **complaint paragraphs 7(a)–(h)**. The complaint contains 11 independent 8(a)(1) allegations that relate to the disciplinary action taken against these store 153 employees. See **complaint paragraphs 6(d)–(l)** and the incidental subparagraphs.

[27] I deem it unnecessary to repeat the justifications addressed and rejected in the previous section that Respondent fashioned from the *VOCA* and *KFMB* cases.

In this and the following section involving Respondent's Distribution Center, several allegations implicate Bashas' established disciplinary policies. Bashas' employee handbook, as revised in October 2006, describes its disciplinary policy. (See GC Exh. 38.) That policy states that Bashas' "is committed to the practice of progressive discipline where the circumstances warrant" but it then goes on to state that each disciplinary matter is handled separately and that one should not assume that the process would be the same in all circumstances. The seriousness of each situation, the policy states, will determine the Company's course of action.

The disciplinary policy lists the following devices that the company utilizes in situations requiring corrective action or more: (1) verbal warning; (2) written warning on a "note to file," (3) memorandum of counseling; (4) memorandum of counseling, with suspension (with or without pay); (5) memorandum of counseling, with a DML (decision-making leave); (6) termination; and (7) any combination of the others. All but the first are written and the employees are typically requested to sign written disciplinary notices. Employees receiving a decision-making leave, effectively a suspension, are provided with a form that must be completed and submitted to a manager upon returning to work. In a nutshell, the decision-making leave form requires employees to provide a written statement of repentance in their own words for the conduct or omission that led to the discipline and a pledge that it will not happen again.

a. Relevant facts

In May 2007, Bashas disciplined three members of the store 153 night crew by suspending them for 3 days, involuntarily transferring them to other stores, and compelling them to sign agreements agreeing to monetary restitution of sorts for "stealing time," a euphemism used to describe periods of time when employees are on the clock but not actually performing their work duties.

Store 153, a Food City retail market, is located at 35th Avenue and Camelback in Phoenix. Bashas' Vice President Swanson serves as the Food City general manager. This particular store is in the district managed by Joel Konicke. At relevant times, the store hierarchy consisted of Jack Eagen, the store director from December 2005 until June 1, 2007, Christina Garcia, the merchandising manager, who ranked second; and Joe Hernandez, the customer service manager (CSM), who ranked third.[28] In agreement with all parties, I find all of the foregoing managers were supervisors within the meaning of Section 2(11) of the Act at relevant times. However, the General Counsel and the Charging Party insist that Baltazar Rincon, the assistant CSM or person in charge (PIC) at store 153, was also a statutory supervisor but Respondent steadfastly denies that to be the case. Janet Santos worked at the store as a PIC-in-training but had no significant involvement in the relevant events.

By the second quarter of 2007 the night crew consisted of Teresa Cano, Ruben Salazar Manuel Acevedo, Paul Romero, and Victor Cabrera.[29] Although Store Director Eagen designated Acevedo to be the night-crew chief and Salazar as the assistant night crew chief, other evidence establishes that both men lacked the willingness to exercise the range of responsibilities expected of a night-crew chief apparently because they received no additional pay for the job.[30] No one claims that the night-crew chief is a statutory supervisor.

[28] Garcia went on a medical leave in April and did not work during the period relevant here.

[29] Acevedo's name is incorrectly spelled "Osouado" at various places in the transcript. I hereby correct those errors to reflect the proper spelling of Acevedo's name.

[30] Salazar and Cabrera came to the night crew around the same time in order to have a night crew presence 7 days a week. This led to Salazar's designation as the night-crew chief on

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The night shift starts at 11 p.m. and ends between 6 and 7 a.m. or later depending on the amount of work. The night crew duties essentially involve moving boxes and crates of merchandise from the store's storage area to the aisles on the retail floor, stocking the shelves, and cleaning up afterward. The night crew workers are permitted to take a 30-minute unpaid lunchbreak and receive two 15-minute paid breaks per shift. Contrary to Bashas' standard policy, Eagen admittedly authorized the store 153 night crew to combine their unpaid 30-minute lunchbreak and 15-minute paid breaks into a single, 1-hour break period. For timekeeping purposes, employees choosing the long break period had to punch out for lunch and then punch back in at the end of the lunch period. Then they could take two consecutive 15-minute breaks on the clock before they were supposed to return to work.

Store 153 is open to the public from 6 a.m. to 11 p.m. The store's "night manager"—ordinarily CSM Hernandez or PIC Rincon—closed down the store's retail operations when the last customers left the store at night. This process involved securing the last cash register tray in the store's safe, arming the burglar alarm, and locking the doors.

Although the night crew chief had a set of store keys and a burglar alarm card, the night crew employees were indoctrinated with a strong sense of being "locked-in" after the night manager set the burglar alarm and went home. (R Exh. 66: 10–15) This perception was reinforced by their instruction to summon the store manager to let them out if they finished their work before his normal arrival time at 6 a.m. A past controversy over a night crew member regularly indulging his smoking habit inside the store also indicates the strength of this "locked-in" perception among those employees. On the rare occasions when the night crew called the store manager to go home early, they did relatively nothing while waiting for the store manager to arrive. This evidence suggests that employees devised their own way of dealing with the predicament of being locked in without enough work to do until the store manager arrived in the morning by extending their mid-shift lunch and break periods longer than authorized. (R Exh. 66: 36–39; R Exh. 60: 24–25.) For this reason, I find the other "time theft" examples provided by Respondent (R Exhs. 68-71) factually distinguishable from the situation found here.

The PIC's job description provides that the incumbent "will effectively assist" the store director, category manager, and CSM in general management duties and share responsibility for the store's operation and performance by helping "direct and supervise all phases of store operations and personnel to achieve sales and customer service goals." The job description goes on to state that the position involves "assisting the management team" in the performance of particular duties and responsibilities that include "controlling labor . . . expenses, enforcing all store rules and company policies, and ensuring that all employees follow company policies involving compliance with health department, weights and measures requirements, liquor and tobacco laws, and cash handling." (GC Exh. 36.) Store Manager Eagen acknowledged that this job description portrayed at least a portion of the PIC's responsibilities and implied that they have many more. However, Eagen and Rae O'Connor, the Food City human resources director, denied that the PIC's possessed authority to discipline employees. As Respondent conducts a formal training program called Management 101 that includes training PICs about disciplinary procedures (Tr. 2240–2241), I do not credit these denials.

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those nights when Acevedo did not work. In his time-theft interview, Salazar said the store had no real night-crew chief and complained bitterly about Eagen's expectations that he serve as the night-crew chief without any added compensation. R Exhs. 60: 27–31; 35–36. Cano said that Acevedo also objected to having the night-crew chief's responsibilities for the same reason.

Rincon signed a disciplinary conference memorandum with a 3-day, decision-making leave to an employee in February 2007. (GC Exh. 37.) Purportedly, the employee, for the second time in a year's period, cashed a public assistance check "that was described as the dollar amount being too high." A decision-making leave amounts to a suspension plus. As previously mentioned, the plus part of this type of leave requires that the suspended employee prepare a written document (labeled a DML Memo, see, e.g., the attachments to R Exh. 33) "stating how this will never occur again." According to this February conference memorandum, the failure to return to work at the end of the leave period with the completed DML Memo "will be a cause of further disciplinarian [sic] action up to termination."

Rincon worked in the typical manager's uniform rather than the black and white uniform combinations worn by the employees. Rincon's shift usually began at 3 or 4 p.m. and ended when the store closed. When Eagen left work around 6 p.m., Rincon commenced his duties as the store's night manager. In addition to the responsibility for securing the store at the end of the day, the night manager typically passed along Store Manager Eagen's instructions to the night crew when its members arrived for work.

Cano began attending union meetings in February 2007. Between that time and early May, she attended two or three meetings each month. Cano recalled that Romero too attended some union meetings and other evidence indicates all night crew employees from store 153 attended union meetings in this period. Prior to her suspension in May, neither Cano nor any other night crew employees openly supported unionization or otherwise publicly sympathized with the union cause. Cano never wore any buttons or items of clothing that would identify her as a union supporter.[31]

However, one night in early April, Rincon approached Cano, Salazar, and Acevedo at work and asked if they had been speaking to the Union. Salazar told him they had. Rincon then left without saying anything further. At the time, Cano feared that sooner or later the store managers would confront them about the Union. About 10 days after his first inquiry, Cano recalled, Rincon told the same group of employees that the union referred to them as the "night crew infestation."

Rincon did not testify. Acevedo and Salazar also did not testify.[32] Hence, Cano's testimony about the substance of these two exchanges is uncontradicted and, as I found her testimony generally reliable and convincing, I credit her accounts about Rincon's inquiry and statement related to their involvement with the Union. In addition, on May 15 in the midst of the disciplinary action against her, Cano told the Food City human resources director, Rae O'Connor, Acevedo and Salazar informed her that Eagen and Hernandez had questioned them in early April about the night crew's involvement with the Union.[33] Eagen denied that he knew

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[31] After the suspensions, near discharge, and transfer of some store 153 night crew employees in May 2007, the UFCW prominently featured Cano, Salazar, and Romero in its professional promotional materials distributed to employees in June, and Cano spoke critically of Bashas on a union-sponsored radio program.

[32] Counsel for the General Counsel represented that Acevedo and Salazar did not appear pursuant to subpoenas served on them by the General Counsel. Nothing indicates that the General Counsel's office sought to enforce those two subpoenas.

[33] General Counsel also sought to introduce this story about Eagen and Hernandez questioning Acevedo and Salazar about their involvement with the Union through Cano. I sustained Respondent's hearsay objection as General Counsel clearly sought to offer this evidence for the truth of the matter asserted. However, Cano's testimony that she told

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of any union activities or sympathies on the part of Acevedo, Cano, Romero, or Cabrera when he issued written warnings to them for their work performance on April 6.

Only Cano and Salazar worked the shift beginning the night of April 3.[34] According to Eagen, the shoddy work by the night crew on this particular shift and an offhanded remark by Cano set in motion the events that nearly led to the discharge of night crew workers Cano, Salazar, and Romero. Eagen purportedly found Cano and Salazar failed to complete their assigned work when he arrived at the store on April 4 so he confronted Cano about it. Cano, he said, protested his criticism, asserted that they had worked hard, and invited Eagen to check the store's security camera video recording (store videos) to confirm how hard they worked.[35] When Cano asked for added hours to make up for the time-off she had taken the previous Sunday, Eagen approved the makeup work but admonished her to do a better job.[36]

Cano's recollection differs considerably. According to her, the first Eagen said anything to her in this general time period about her work performance occurred on the morning of April 6 when Eagan arrived at work. When Eagen approached Cano that morning, he began telling her "the store wasn't the way that it should have been, that the arrangement of the cans with the labels were not well arranged or aligned. . . . He said it wasn't done right, that there was dust in the aisles." In response, Cano asked why Eagen was only addressing her "in such a raised voice" because she had not been the only one who had worked that night. She told him that there had been four people working that night and that she had been helping train Cabrera who had only recently started on the night crew. Cano claims Eagen just walked away after she invited to go with her throughout the store to see the work that she and Cabrera had done.

On the evening of April 6, Merchandise Manager Garcia gave the four night crew employees who had worked the previous shift a written warning prepared and signed by Eagen concerning their job performance on that shift. Eagen used a Note to File form for three of the employees and a Conference Memorandum (a higher form of discipline) for Cano's warning.[37] Her version details certain deficiencies and warns that "this type of performance is unacceptable and need[s] to be corrected right away." Future performance issues, Eagen's memo states, "will be taken to the next level of discipline." (GC Exh. 6.) The memo makes no reference to any alleged work deficiencies on the shift that began on the night of April 3 or any other time.

Meanwhile, Eagen said that he looked at the store videos for the April 3–4 shift as Cano purportedly requested. That review, he asserted, disclosed that these two employees spent significant time while on-the-clock lounging at one of the checkout registers during the early

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O'Connor about this questioning by Eagen and Hernandez is not hearsay and the Company's sudden turnabout on the discipline planned for the store 153 "time thieves" after learning about Cano's charge lends some support for an inference that the corporate managers (Swanson, Konicke, and O'Connor) either confirmed or otherwise believed her assertion.

[34] See R Exh. 27. The first time reflected under the date column work schedule for the week from April 1 to 7 shows the shift starting time. It reflects that Cano and Salazar worked the April 3 shift that ended on the morning of April 4. Tr. 1296.

[35] Bashas' retail stores are equipped with security cameras some of which are visible to employees and customers and "covert" cameras unknown to even the store directors.

[36] This explanation seemingly explains how she came to be working that night when she normally would have been off.

[37] Eagen testified that he ran out of Note to File forms by the time he got around to preparing Cano's warning but he intended it to be a Note to File also. As he failed to manually alter Cano's form in any way to reflect that intention, I do not credit this explanation.

morning hours of April 4. No evidence shows that Eagen ever reviewed the store's videos before to check-up on the night crew even though he had earlier received "rumors" at some from workers who cleaned store shelves at night that the night stockers were "messing around, they were not doing anything." However, Eagen said, in effect, that he did not take the report seriously because he thought it amounted to one employee taking credit for working hard and blaming other employees for hardly working.[38] After reviewing the store video on April 4, Eagen took no action the rest of that day and made no attempt the following morning to review the store videos for the shift that began that night and ended the next morning (April 5) that involved a larger crew.

The first action taken by Eagen after reviewing the store videos occurred shortly before noon on April 5. At that time, Eagen called Bashas' loss prevention department (LPD) and spoke to Trish Lowderback, a loss prevention specialist.[39] Eagen reported what he had seen on the April 3 video and asked Lowderback to follow up on his observations from the store videos because LPD personnel "have the time and the capability of going back or forward where I can only do . . . certain segments." Following their telephone conversation, Eagen sent two short e-mails on April 5 to Lowderback describing some of the detail he observed on the store's SCVR for the shift beginning on the night of April 3. The e-mails reported that Cano and Salazar punched in from their lunchbreak at 1:25 a.m. and spent the next 50 minutes or so at one of the checkout registers. (R. Exh. 28.) As they combined their two 15-minute breaks with lunch, Eagen's review, if true, means that they overstayed their authorized breaktime by 20 minutes.

Lowderback's duties include the investigation of thefts at various stores assigned to her. Her investigations include so-called "time theft" situations, i.e., time spent by employees on the clock but not actually performing their assigned duties. Lowderback, who had wide experience in several positions with the Company before becoming an LPD specialist 4 years ago, conducts 6 to 10 theft investigations per month. She estimated she conducted probably more than 10employee time-theft investigations during her time in LPD. Early in the investigation of a loss report, Lowderback makes an initial determination as to whether there is sufficient evidence to even merit an investigation. The principal tools for a time-theft case include the store's videos, the employee work schedules, and the punch detail reports.[40]

After receiving Eagen's April 5 call and e-mails, Lowderback reviewed the portions of the store 153 videos in conjunction with the punch detail reports for the times that Eagen referred to and made a determination to open an investigation dealing only with Cano and Salazar. She worked on the investigation off and on for the next 30-plus days.

By May 9, Lowderback had completed her investigation of Cano and Salazar. She estimated she spent about 16 hours obtaining a representative sampling of the break time practices of Cano and Salazar from the store's videos and punch detail reports. Lowderback prepared a case status report dated May 9. It states that Eagen called her on the morning of

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[38] Other evidence described below indicates Eagen made contradictory representation about the cleaning crew's "rumors."

[39] The record contains numerous misspellings of Lowderback's name. It is hereby corrected to reflect the proper spelling as shown here.

[40] A punch detail report is the name used for an electronic record of an employee punching in and out for work. Company policy requires employees to punch in when their shift starts and out when it ends. The same is true for lunch and rest breaks but employees receive pay for the latter. The store videos display a running date and time strip.

April 5 complaining about his night crew sleeping on the job. The report goes on to state that Eagen learned of this when he had "several daytime members . . . work overnight for several shifts to do some extra cleaning" and the following day "one of these members reported . . . he had observed the night crew members taking extended lunches and breaks and sleeping and reading at the registers." Going further, Lowderback's report states that Eagen told her that "he watched some video of the early morning hours of April 4, 2007, and saw Ruben Salazar and Teresa Cano reading and sleeping at the register area while they were clocked in." (R. Exh. 54.)

Eagen asserted that he had no involvement with Lowderback's investigation following his April 5 report to her until he received a call from her to notify him that she planned to conduct unannounced interviews of Cano and Salazar.[41] Around that same time, he also received a call from Division Manager Konicke directing him to sign disciplinary documents prepared by Lowderback suspending both employees for 3 days, a recommendation Lowderback made when she reported the results of her investigation to Konicke. Suspension in time-theft cases is a standard, preliminary step taken while management makes a final disciplinary decision. Typically, employees are fired for time theft infractions.

On the morning of May 9, Lowderback and Mike Howard, an LPD supervisor, went to store 153 sometime before 5 a.m. to conduct recorded interviews of Cano and Salazar. Lowderback briefed Howard, who had not been involved in the investigation, on her findings and provided him with still photos to use for the Salazar interview. Meanwhile, Lowderback interviewed Cano. One of the obvious purposes of the loss-prevention interview is to press the employee to admit the infraction indicated revealed during the investigation. Another purpose is to secure a form of recovery from the employee for the time theft.[42]

Salazar's recorded interview lasted from 4:58 a.m. and until 5:59 a.m. (R Exh. 60.) The transcript reflects a somewhat engaging exchange for the first half of the interview. Thereafter, Howard became very accusatory. He impliedly threatened Salazar with termination if he failed to tell the truth and things went "south." Eventually, Salazar admitted that he and the other night crew members sometimes took up to an hour and a half break at lunchtime. As Salazar described it (with the help of Howard's leading questions), the crew would punch out and then back in as prescribed for their half-hour lunch period. Instead of returning to work following lunch, Salazar said the employees sometimes took their two 15-minute breaks together (without recording these break periods as company policy requires) plus an added half an hour for a total break period 1-1/2 hours. Following that admission, Salazar began to complain bitterly about his assignment to the night crew for a period longer than promised by Eagen and his lack of pay for the added crew chief responsibilities when Acevedo was not working. Howard listened but made the point that he lacked authority to address Salazar's complaints. The interview concluded after Howard spent several minutes attempting to obtain Salazar's agreement to the number of days per week over the past 3 months that he had taken an extended lunch period so a payback calculation could be made. Eventually, Salazar signed an agreement to repay

[41] During her investigation, Lowderback visited store 153 to obtain employee work schedules. There is no evidence she spoke to Eagen on this visit.

[42] Lowderback referred to this recovery in time theft cases as "restitution." In fact, this restitution is based on little more than a guess the interviewer pressures the employee to make about the amount of time he/she was paid for when not working as required multiplied by the employee's hourly pay rate. Lowderback calculated the actual minutes she purportedly observed Cano and Salazar spent on the clock not working for a representative number of days. Those calculations were never disclosed to the employee or used for restitution purposes.

Bashas $269.46 by withholding that amount from his pay. He was also given a 3-day suspension. No mention was made of the Union or the organizing campaign throughout the entire interview by either man

Cano's interview started at 5 a.m. and lasted about 2-1/2 hours.[43] At about the midway point, Cano came to suspect that her union activity had landed her an interview with Lowderback. Cano made two or three requests to leave but Lowderback told her she could not. Lowderback reminded her that she was being paid for the interview time and that if she left she would be treated as having walked off the job. Cano then offered to punch out and leave but Lowderback emphasized that she would be terminated if she left at that stage of the interview. Soon thereafter, Lowderback left the interview for about 15 minutes to locate Howard because she felt Cano had become uncooperative. When they returned together, Howard resumed the interview along the line Lowderback had attempted to pursue. The following segment of the transcript reflects the early stages of Howard's questioning:

M. Howard	Okay. Teresa, I'm deeply concerned. I'm deeply concerned when Trish was asking you questions about whether or not you caused a loss to the company you said yes. And then she asked you if you'd be willing to pay the company back, what was your response
T. Cano	I told her I didn't have the money.
M. Howard	Okay
T. Cano	Why am I going to respond to something yes or no, yes if I know I'm not going to be able to?
M. Howard	Because I want you to focus on what the question is actually asking. The question you're being asked is whether or not you think it's the right thing to do. Do you feel it's the right thing to pay the company back?
T. Cano	Well that's the right of the company.
M. Howard	What's that?
T Cano	That's the right of the company. The company's going to do what they want.
M Howard	You're not answering my question. My question to you is, do you as a

[43] I base this finding on Cano's testimony. Tr. 270. Respondent attacks Cano's credibility based in part on her estimate about the length of the interview arguing that Lowderback's written record of the interview shows that it ended at 6:25 a.m. R Br. 7–8. In fact, the transcript of Cano's recorded interview shows it "paused" at 6:25 a.m. Other evidence shows Lowderback then left the room to locate Store Director Eagen and prepare the written suspension notice, and then returned with Eagen who issued the suspension notice to Cano and attempted to get her to sign it. If find Lowderback's record testimony, if anything, supports Cano's credibility. Respondent also attacks Cano's credibility because she chose to testify in Spanish, her first language, at the hearing but agreed to be interviewed by Lowderback in English. I find that argument equally unpersuasive where, as here, the Company prepared Cano's final disciplinary document related to this matter in Spanish.

human being feel that it's right to pay the company back?

T. Cano I already answered her, and I already answered you. I don't have the money.

M Howard The answer that you gave me has absolutely nothing to do with the question that I just asked you. My question is not whether or not you have the money. I don't care what you have in your bank account or don't have in your bank account. The only thing I care about is whether or not you believe it's right to pay the company back. And I'll tell you why it disturbs me that you're not willing to answer the question. And that is because as somebody representing the company, we need to know if our members, if when they make a mistake, if they're willing to do the right thing, okay? And I'm not asking you to pay it back. I'm asking you if you believe it's the right thing to do. And it's disturbing if you say yes I caused a loss to the company, but yet you don't seem to care whether or not you make the company whole. Am I understanding you correctly?

T. Cano Not really

M. Howard What?

T. Cano Well, what do you want me to answer? Yes?

M. Howard No, I want you to tell me what you honestly think.

T. Cano Well, I guess the answer the guys want to hear is yes. Then yes.

(R Exh. 59: 32–33.)

This next stage of Cano's interview reflects a portion of a theme present to some degree in all three of the night-crew interviews Lowderback and Howard conducted. As can be seen, Howard becomes insistent that Cano admit the moral culpability of a common thief for failing to work while on the clock.

M Howard I want you to explain to me why you believe it's (paying back the money) the right thing to do. As a company, I have a right to know that.

T. Cano Well, because like you said they paid me, and I wasn't working.

M. Howard Do you feel that that was wrong?

T. Cano Yeah it's wrong.

M. Howard Okay, would you say that that's stealing from the company?

T. Cano That's the way you guys put it then I guess yes.

M. Howard That wasn't my question. Once again, my question to you, Teresa, believe that that's stealing? Receiving payment for time not worked. Is that stealing, yes or no?

T. Cano No, I just didn't work it.

M. Howard No you just didn't work it?

T. Cano No. I just didn't work.

M. Howard Explain to me how it's different . . . from a cashier taking money out of the till.

T. Cano That's different.

M. Howard And the money goes in her pocket.

T. Cano I didn't took [sic] nothing from the store.

M. Howard You did. You took plenty from the store. You took paychecks that had time that you should not have gotten. As somebody who works for the company, I don't expect to get time for things that I didn't actually work. That would be wrong. And I would consider that stealing, but I want to know if you do.

T. Cano Okay, then. Yes.

M. Howard Do you think that—do you, Teresa, feel. . .

T. Cano [Sighs]

M Howard that the word stealing accurately describes your actions? Yes or no?

T. Cano Yes.

M Howard Why?

T. Cano That's what you guys want to hear.

R Exh. 59: 35-36.

During further questioning by Howard, Cano provided a guesstimate that Lowderback found sufficient for a hasty calculation of $59.88 (4 hours times Cano's hourly rate of $14.97) owed by Cano to repay the Company for time she had not actually worked. Unlike Salazar, Cano refused to prepare a written statement of what had occurred during the interview or sign an authorization for Bashas to deduct that amount from her pay. Eagen came to the interview room at the end of the process to sign and issue Cano's suspension notice. The notice advised Cano to return to the store on May 14 to discuss her future with Food City.

On May 11 or 12, Rae O'Connor, the Food City human resources director, called Cano with instructions that she should come to the corporate headquarters to meet with O'Connor on May 15 rather than returning to the store on May 14. Ostensibly, the meeting at the human resources department had been arranged to terminate Cano. However, during the course of the meeting, Cano again expressed her own opinion that the time-theft accusations were the result of her union activities rather than the wrongdoing with which she had been charged. O'Connor did not respond to Cano's allegation at the time. At the end of the meeting, O'Connor told Cano

that she would be discharged like others the Company caught not working while on the clock. However, O'Connor told Cano that she first had to speak with her superiors.

That evening O'Connor called Cano at home to ask specifically who in the store knew she had spoken to people in the Union. Cano told O'Connor about the occasion when Rincon asked a group of night crew members if they had spoken to the Union. She also told O'Connor that Acevedo and Salazar had told her that they had been questioned about the union by Store Director Eagen and CSM Hernandez. O'Connor thanked Cano and said she would call again.

Following her telephone conversation with Cano, O'Connor met with Division Manager Konicke and Vice President Swanson. O'Connor reported the information she obtained from Cano in the phone call to the two executives. She also reported Cano's complaints about the lack of an effective night-crew chief, the Company's failure to pay someone to perform the night-crew chief's job, and the inequitable distribution of work on the night crew. Whether O'Connor went into Cano's extended report about the various store managers engaging in activities other than work during their duty hours is not clear. Regardless, Konicke decided that Cano's penalty should be limited to a conference memo with a DML warning her about not working while on the clock. In addition, Konicke decided that Cano should be transferred to another store.

At 8 a.m. the following day, O'Connor called Cano and asked if she would come back to her office at noon that day. Cano, expecting that she would be discharged based on what O'Connor had said at the end of their meeting the previous day, told O'Connor that if she planned to fire her she should do it over the phone because it would be a waste of her time and gasoline to drive all the way back to the company headquarters for that purpose. O'Connor told Cano that she was not supposed to tell her but she would not be fired if she came back to the headquarters. O'Connor also told Cano that she needed to return in order to sign some papers. When Cano went to headquarters, she met with O'Connor and Konicke. Konicke informed her that Bashas was giving her another chance rather than discharging because they did not want her family to be without medical benefits. Cano received a warning and a DML form along with a deadline for completing it. She returned the following day with her completed DML and was transferred to a different store a little further from her home than store 153.

Salazar received the same disciplinary action and was also transferred to a different store. Based on Cano's complaints about others, Lowderback said she then reviewed a limited sampling of the store 153 videos looking for instances where the remaining three night shift employees were not working while they were supposed to be on the clock. This limited review failed to disclose that Acevedo or Cabrera had done so. However, she did locate two or three instances where Romero had punched in but failed to return to work as required. Lowderback and Howard interviewed Romero in a manner similar to the Cano and Salazar interviews. Romero received a 3-day suspension along with a $973.05 bill for time spent on the clock and not working over the course of the past 2 years. As in the case of Cano and Salazar, the basis for this calculation rested solely on Romero's guesstimates. Romero was not transferred.

By the end of May, Bashas' demoted Eagen to a merchandise manager position and transferred him to another store. Rincon was also transferred as was PIC-in-training Janet Santos. Hernandez received a note to file, in effect, a warning.

b. Argument, analysis, and conclusions

Complaint paragraph 6(d) alleges that Rincon unlawfully interrogated store 153 employees in mid-April and paragraph 6(g) alleges that Rincon created the impression among store 153 employees that Bashas had their union activities under surveillance and disparaged

the Union to those employees in order to discourage their activities. **Complaint paragraphs 6(e) and (f)** allege that Hernandez and Eagen, respectively, unlawfully interrogated store 153 employees. **Complaint paragraph 6(h)** alleges that Lowderback's interview and threats of discharge unlawfully coerced store 153 employees. **Complaint paragraphs 6(i) and (j)** allege that O'Connor unlawfully threatened and interrogated store 153 employees on or about May 16. **Complaint paragraphs 6(k) and (l)** allege that O'Connor and Konicke, respectively, threatened store 153 employees.

Complaint paragraphs 7(a),(b) (d), and (g) allege that various warnings issued to Cano between April 4 and May 16, as well as Cabrera's written warning of April 6 (complaint par. 7(c)), violated Section 8(a)(3). **Complaint paragraphs 7(e) and (f)** allege that the May 9 suspension of Cano and Salazar also violated the same section of the Act. Finally, **complaint paragraph 7(h)** alleges that Cano's transfer from store 153 to store 126 violated Section 8(a)(3).

Rincon's status as a Section 2(11) supervisor: Respondent disputes the supervisory status of the PICs generally and Rincon in particular. Under Section 2(11), individuals are statutory supervisors "if (1) they hold the authority to engage in any 1 of the 12 supervisory functions . . . listed in Section 2(11); (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;' and (3) their authority is held 'in the interest of the employer.'" *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). If the putative supervisor possesses the authority either to perform any one of the listed supervisory functions, which includes the authority to suspend or discipline other employees, or to effectively recommend such action, then that individual may be found to be a statutory supervisor. Id.

I do not credit the glib denials by Eagen and O'Connor that Rincon lacked authority as a PIC to discipline employees. Likewise, I find the proof insufficient to support Respondent's argument in its brief that the type of discipline covered by the Rincon conference memorandum in February did not require the exercise of independent judgment because it dealt with a matter subject to strict State agency regulation.

Based on the PIC's job description vesting the PIC with authority to ensure adherence to cash handling policies, Eagen's acknowledgment that Rincon possessed and performed the full range of a PIC's responsibilities, Rincon's actual exercise of that authority by suspending an employee for a cash handling offense, Rincon's use of the same uniform combinations worn by other admitted supervisors, and the added fact that he was regularly the only manager at the store for portions of the workday, I find Rincon was a statutory supervisor at relevant times.

The 8(a)(1) allegations: Having concluded that Rincon was a statutory supervisor, I find his inquiry as to whether the night crew employee had talked to the union and his subsequent remark that the union called the employees the night-crew infestation violated Section 8(a)(1) as alleged in **complaint paragraphs 6(d) and (g)(1)**, respectively.

The Board and the courts look to the totality of the circumstances in deciding whether an employer's questioning of employees about their Section 7 activities violates Section 8(a)(1). *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1080 (9th Cir. 1977); *Rossmore House*, 269 NLRB 1176, 1178 (1984). Among other factors, the Board looks to the background, the nature of the information sought, the identity of the questioner, and the method of interrogation. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985).

No evidence shows that the night crew employees openly displayed their union sympathies. From the available evidence, Rincon made no attempt to explain the purpose of his question about their talking to the Union and said nothing that would serve to assure employees that he had some legitimate purpose for asking if they had talked to the Union. Instead, I find the inquiry coercive because it had the characteristics that would reasonably lead employees to believe that he sought information that could be used against them at a later time.

A statement to employees causing them to reasonably assume that their employer had placed their protected activities under surveillance violates the Act. *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999); *Electro-Voice, Inc*., 320 NLRB 1094 (1996). In *Tres Estrellas de Oro*, the Board explained that an impression of surveillance statement violates Section 8(a)(1) because employees have a right to engage in protected activities without fear that their employer is peering over their shoulders, taking note of those involved and how. Above at 51.

I find that Rincon's infestation remark conveys a message that he had gained information from an undisclosed source about the night crews' union sympathies. Because this remark implies that Respondent's officials were carefully monitoring their protected union activities, I find it violated Section 8(a)(1).

However, I find no merit to the General Counsel's further allegation in **complaint paragraph 6(g)(2)** that the infestation remark also amounted to a disparagement of the Union to the employees. Supposedly, Rincon attributed the infestation characterization to the Union. Assuming a union source which I doubt, this description in the midst of an organizing campaign could well amount to praiseworthy words signifying progress toward an ultimate organizational goal. In this sense, it could be understood as similar to the "foot in the door" metaphor. Cano understood the remark to mean that they were spreading the word about the Union to other employees. I find the remark so inherently ambiguous as to preclude finding it "disparaging."

I find the General Counsel failed to sustain with first-hand evidence the allegations that Eagen and Hernandez coercively interrogated employees as alleged in **complaint paragraphs 6(e) and (f)**. However, the General Counsel argues that Eagen designated Acevedo and Salazar as night-crew chiefs with the responsibility for relaying information from management to other night crew employees. Therefore, the General Counsel claims that they were agents of Bashas within the meaning of Section 2(13) of the Act. Because of their agency status, General Counsel contends, Cano's testimony that they told her about their interrogations by statutory Supervisors Eagen and Hernandez amounts, in effect, to a party admission rather than hearsay as I ruled at the hearing.

I reject the claim that Respondent is responsible for what the night-crew chiefs said to Cano about Eagen and Hernandez questioning. I find the evidence insufficient to show that the night-crew chiefs are Respondent's agents under the Act simply because their ordinary duties involved passing along information from other managers about the work to be done on the night shift. Other evidence establishes that Acevedo and Salazar eschewed even those limited responsibilities. Finally, although the General Counsel discussed this type of argument at the hearing, the complaint was never amended to allege Acevedo's status as Respondent's agent responsible for making any type of coercive statement. Instead, this whole argument appears to be little more than a disingenuous concoction designed to get around the predicament that resulted when Acevedo and Salazar failed to appear at the hearing and testify pursuant to the General Counsel's subpoena.

The remaining independent 8(a)(1) allegations pertain to the conduct of Konicke, Lowderback, and O'Connor. This conduct of these three company officials is closely intertwined

with the 8(a)(3) allegations about to the disciplinary action Bashas took against three night crew employees in May. As such, the merits of these allegations turn largely on the motive underlying that disciplinary action. Accordingly, the remaining independent 8(a)(1) allegations will be considered together with the 8(a)(3) allegations concerning store 153 employees.

The 8(a)(3) allegations: Initially, Respondent argues that the allegation in complaint paragraph 7(a) about an oral warning Eagen purportedly gave to Cano on April 4 should be dismissed because the General Counsel failed to present any supporting evidence. I agree.

This issue is unnecessarily complicated by the General Counsel's odd handling of this allegation. General Counsel adduced no evidence from Cano to either support or to deny that she received a verbal reprimand on or around April 4, the night when the crew consisted only of Sanchez and herself. However, the General Counsel adduced evidence from Eagen about an exchange he purportedly had with Cano on April 4, but I do not credit Eagen's testimony on this score. Even though Cano did not squarely contradict Eagen, she also gave no indication that a conversation such as Eagen described ever occurred. In addition, Eagen's April 6 written reprimand of Cano contains no reference at all to an earlier criticism that week of Cano's work performance as one might reasonably expect. Moreover, Eagen claims that Cano's challenge for him to check the store cameras during their April 4 exchange led him to contact Lowderback. That claim is vastly different than the account memorialized in Lowderback's May 9 final report where she said that Eagen's suspicions had been fueled by reports from a shelf-cleaning crew that had worked alongside the night stocking crew, a report that Eagen himself dismissed as an insignificant rumor. In view of these hopeless contradictions and unexplained omissions, I do not credit the Eagen's claims about reprimanding Cano on April 4. Hence, I recommend that dismissal of **complaint paragraph 7(a)**.

General Counsel's treatment of the allegations in Complaint paragraphs 7(b) and (c) (Cano's April 6 conference memo warning and Cabrera's April 6 note to file warning, respectively) is equally puzzling. The credible evidence establishes that Eagen prepared, and Garcia issued, warnings to all four night crew employees who worked the April 5-6 shift. General Counsel's brief recites some of the evidence concerning the April 6 warnings but advances no argument as to why only two of these warnings violated Section 8(a)(3) but the other two did not. This alone precludes me from finding that that the General Counsel's case on these two allegations has a persuasive quality at all. In addition, the warnings on their face recite legitimate job shortcomings (failing to do any of the assigned back stock work and failing to properly face the stock on the shelves) that were never really denied or explained by Cano, the General Counsel's sole employee witness on these issues.[44] Although the timing and the disparity as shown by Cano more severe warning provides some basis for suspecting that they might have been motivated by union activity, such suspicions are blunted by the lack of evidence about union activity by Cabrera and Romero. Hence, I find the evidence insufficient to conclude that the General Counsel met the initial burden required by *Wright Line* as to these allegations. Accordingly, I recommend dismissal of **complaint paragraphs 7(b) and (c)**.

Respondent also argues that the General Counsel failed to prove a prime facie case that antiunion considerations motivated the May 9 suspensions because Konicke made that decision and no evidence shows that he knew about any union activities by Cano and Salazar at that time. This argument lacks merit. First, to the extent that this argument assumes that the General Counsel has the burden of proving knowledge on the part of the specific management

[44] Instead, oddly enough, counsel for General Counsel adduced evidence from Eagen as a 611(c) witness consistent with the April 6 warnings.

official who orders an adverse action, I find no merit to this claim. A supervisor's knowledge of employee union activity is generally imputable to the employer. As found above, Rincon made probing inquiries about the night crew's union activities early in April prior to the time that Eagen initiated the LPD investigation and suggested shortly afterward that their activities were being monitored.[45] Hence, I am satisfied that knowledge of the night crew's union sympathies existed in the store management pipeline before Eagen initiated the LPD inquiry with his April 5 call to Lowderback. But even assuming that Konicke did not know about the union activities and sympathies of Cano and Salazar on or before May 9, it makes no difference in view of the finding made below that the LPD investigation was tainted from the outset because Eagen initiated it for discriminatory reasons. Moreover, O'Connor provided Konicke with information she obtained from Cano showing that the store management had knowledge of the night crew union activities before the loss prevention investigation and he, in effect, ratified the adverse action taken against the employees as a result of that investigation.

In my judgment, the General Counsel's proof satisfied the *Wright Line* burden of showing Respondent acted with a discriminatory motive when it suspended Cano, Romero, and Salazar in May 2007, and when it concurrently transferred Cano and Salazar to different stores. The complaint inexplicably contains no allegation that Salazar's transfer violated the Act. Although less puzzling in a way, the complaint also contains no allegations that pertain to Romero at all. However, the Board may find and remedy an unfair labor practice even if it is unalleged provided the matter is closely related to other complaint allegations and has been fully and fairly litigated. *Alexander Dawson, Inc. v. NLRB*, 586 F.2d 1300, 1304 (9th Cir. 1978); *Monroe Mfg.*, 323 NLRB 24, 26 (1997). I find Salazar's transfer and Romero's suspension closely connected to the allegations in the complaint because these actions grew out of the same tainted loss prevention investigation that resulted in Cano's suspension and transfer as well as Salazar's suspension. Respondent virtually concedes as much and introduced most of the evidence related to Salazar's transfer and Romero's suspension. Accordingly, I find these additional matters have been fully litigated.[46]

Bashas' antecedent unfair labor practices, notably its withdrawal of recognition from Local 99, establish its animus toward that labor organization. Rincon's interrogation, which I find occurred prior to Eagen's verbal and written exchanges with Lowderback on April 5, shows specific knowledge of the night crew's union activities within the management circle at store 153. Rincon's later infestation remark, ambiguous though it is, signifies a continuing interest by management in the night crew's union sympathies. Hence, both before and soon after the loss prevention investigation began, the night crew's union activities were under scrutiny by the store management. The Board and the courts consider the timing of an adverse action such as this to be a significant factor in determining the question of motivation. *Power, Inc. v. NLRB*, 40 F.3d 409 (DC Cir. 1994) ("Motive is a question of fact, and the NLRB may rely on . . . such factors as the employer's knowledge of the employee's union activities, the employer's hostility toward the union, and the timing of the employer's action."); *Equitable Resources*, 307 NLRB 730, 731 (1992) (timing of layoffs some 2 months after organizing began and a week after election coupled with unlawful interrogation and threats support a finding of discriminatory

[45] Respondent' brief calls attention to Cano's prehearing statement in which she stated that she thought Rincon's initial inquiry occurred after April 6. R Br. 8, citing Tr. 352: 17–354: 20. However, for reasons previously stated about the impressions Cano made while testifying, I am satisfied that her account at the hearing is more reliable.

[46] The charge in Case 28–CA–21592, filed September 27, 2007, and later amended November 5 and December 31, alleges that Cano "and others" were disciplined on April 6 and suspended on May 9. The November 5 amendment alleges Salazar's suspension as unlawful.

motive). In my judgment, there is a strong connection between the time the store management learned of the night crew union activities and the time that Eagen initiated the LPD investigation.

In assessing whether the General Counsel has satisfied the requisite burden of persuasion, the trier of fact may also consider the respondent's explanations for the adverse action taken. *Holo-Krome Co. v. NLRB*, 954 F.2d 108, 113 (2d Cir. 1990). As found above, I do not credit Eagen's claim that Cano's challenge lead him to review the store's videos and discover the night crew was not working while on the clock. This fact, and the added fact, that Eagen and Lowderback differed as to the significance of the cleaning crew rumors for the initiation of loss prevention investigation, is evidence that detracts considerably from Respondent's claim that the motive underlying the initiation of the LPD investigation was legitimate. Eagen's explanation for initiating the LPD investigation is, in my judgment, a pretext.

The lack of evidence that Eagen or any other manager initiated any immediate corrective action or issued even the slightest warning to the night crew after allegedly discovering they were sloughing off while on the clock or hearing about that possibility earlier also suggests some motive other the operational efficiency of the store and the Company. If Romero's confession to Lowderback and Howard is truthful, some night crew at Store 153 had apparently taken extended break periods for as much as 2 years without any intervention from the store management. Despite that, Eagen did not take the night cleaning crew reports about the stockers that seriously even though Acevedo had been warned a couple of times in the prior year about the failure of the night crew to perform its work. The fact that Eagen set the LPD investigation in motion almost immediately after Rincon questioned the night crew strongly supports the inference that the crew's union activities motivated his call to Lowderback.

In addition, no explanation is provided as to why Eagen limited review of the store videos to the night of April 3 when only two crew members worked or why he lacked the motivation to look at the videos for April 4 when the entire night crew worked, especially after what he claimed to have seen on the April 3 video and the earlier report from the shelf cleaners. Even Lowderback's assertion that she limited her initial investigation to Cano and Salazar, and expanded it to the entire crew in May only after Cano asserted others too took longer breaks than allowed is highly suspicious. These facts together with the fact that Cano received a more serious written warning on April 6 strongly indicate that she was the real target. After considering Cano's role as an early union supporter and reviewing the evidence in this case that demonstrates the strength of her personality so unequivocally, I am satisfied that Respondent's officials viewed her as the leader of the "night crew infestation."

The sudden decision that Cano and Salazar would not be fired as had apparently been planned, along with Eagen's demotion and transfer, and the disciplinary action taken against other store 152 managers also provides support for the General Counsel's case. Company Executive Swanson and Division Manager Konicke were largely responsible for these sudden and extraordinary change of policy (firing employees who engaged in time theft) after O'Connor reported to them on May 15 about Cano's claims that the store managers had been questioning the night crew about their union activities. Eagen's explanation that his demotion in late May resulted from favoritism shown certain employees during the holiday season and because he allowed a worker to bring a child to the store for a few minutes strikes me as another fabrication on his part. In sum, I find that the evidence detailed above merits the inference that Eagen initiated the LPD investigation of the night crew in an effort to rid himself of a group of union activists.

Having concluded the General Counsel met his initial burden of persuasion, the burden of persuasion shifted to Respondent to establish that it would have taken the same action even

if the employees had not engaged in protected activity. Respondent argues that it disciplined sStore 153 night crew employees in May 2007 for a legitimate business reason, i.e., not working while on the clock. Respondent notes that all three who were disciplined admitted that they had taken more break time than allotted from time to time, thereby causing a loss to the Company not unlike "stealing product or money from the cash registers." Respondent argues that even though the timing of the loss prevention investigation at store 153 might be argued by some as being suspicious because it occurred around the time the union activities began, "the undisputed evidence demonstrates that the time theft investigation began because of a comment Cano made to Eagen" who "had no idea that any member of the Night Crew [including Cano] had any involvement whatsoever with the Union."

Were these various claims made by Respondent true, I might agree that it met its burden of persuasion. But they are not and, hence, Respondent has not established a persuasive defense. Respondent had the burden of showing that it would have undertaken its LPD investigation of the night crew even in the absence of their union activities. It failed to meet that burden. Respondent does not periodically spot check its night workers to insure exacting compliance with the break rules. Eagen made no previous attempt to check the store videos in the past when he encountered production deficiencies on the part of the night crew or even when he heard rumors about them sloughing off. Instead, Respondent relies on Eagen's untruthful reasons for initiating this investigation and unconvincing reasons for its narrowness after it began. Eagen's assertion at the hearing that Cano led him to look at the store videos is inconsistent with what he apparently told Lowderback. In addition, I find Eagen's claim that he knew nothing about the night crew's union activities lacks credibility where other uncontradicted evidence shows that another store manager, Rincon, had already been questioning employees about their union activities and later made a statement to some of the night crew indicating a continuing interest in those activities.

The timing and the narrow scope of the initial investigation are particularly difficult facts for Respondent to overcome. Assuming, as Eagen claimed, that he observed lounging while on the clock after checking the store videos as Cano challenged him to do, he went no further to check on the conduct of the entire crew the following night. As a result, only the two of the stronger union activists on the night crew (Cano regularly attended union meetings, and Salazar openly acknowledged their union contacts to Rincon) were singled out for an investigation. This utter lack of curiosity by the store manager supposedly dissatisfied with the overall night crew performance detracts from any claim that this investigation resulted from a legitimate business purpose at all. Simply put, no evidence shows that an investigation like this would have ever occurred were it not for the night crew's union sympathies and activities. Accordingly, I find Respondent failed to meet its *Wright Line* burden.

Based on the foregoing, I find that Eagen set the loss prevention investigation in motion to retaliate against the union sympathizers on the store 153 night crew. Having reached that conclusion, I find Respondent used the lunch and rest break violations turned up in the LPD investigation as a pretext to discipline the night crew employees for their union activities. *Care Manor of Framington, Inc.*, 318 NLRB 725 (1995). Accordingly, I find the suspensions and transfers of Cano, and Salazar, and the suspension of Romero violated Section 8(a)(3). I further find merit to the additional complaint allegations concerning the loss prevention interviews (see **complaint pars. 6(h)(1) and (2)**) of all three store 153 employees by Lowderback and Howard violated Section 8(a)(1)). Finally, I find the related threats and interrogation on the part of O'Connor and Konicke as alleged in **complaint paragraphs 6(i)–(l)** have merit.

2. The Maria Acosta allegations.

The General Counsel's complaint alleges that Respondent unlawfully transferred union activist Maria Acosta from a store relatively close to her home to another store more than 15 miles from where she lived, and reduced her work hours at the new location. The complaint also contains a number of independent 8(a)(1) allegations associated with Acosta's transfer.

a. Relevant facts

Maria Acosta first began working for Bashas in September 2000 as a part-time courtesy clerk. She started at store 105. During her pre-employment process, she completed an I-9 Employment Eligibility Verification form whereon she erroneously attested that she was an alien authorized to work until September 5, 2001. Acosta voluntarily transferred to store 20 in 2002 and thereafter she went to store 107. In April 2006, she returned to store 20 as a utility clerk where she worked until her involuntarily transfer to store 163 on September 23, 2007, a move included bagging groceries, getting ice, retrieving carts in the parking lot, restocking shelves, and performing miscellaneous cleanup work.

When Acosta returned to store 20, the store management consisted of Paul Harper, store director, Jerry Schrock, merchandise manager, and Victoria Zamora, PIC. Harper remained as store director until the first week of September 2007 when the Company transferred him to another store and Charles Bootman became the store director. In mid-to-late 2006, the store 20 CSM went elsewhere on another assignment and, apparently, never returned. With the CSM's departure, Zamora became the acting CSM's and performed those duties until May 27, 2007, when she began working as a nonsupervisory cashier, a position she previously held. For whatever reason, Acosta continued to identify Zamora as a member of the store's management well after she ceased working as the acting CSM.[47] In June 2007, the Company transferred Vanessa Sainz to store 20 as the CSM and Johnnie Padilla as the PIC. The principal allegation here concerns the transfer of Acosta from store 20 to store 162 where, initially, she worked mostly as a custodian and later as helper in tortillaria department.

Sainz described Acosta's job performance as very good albeit she was somewhat slow in performing her assigned tasks. Acosta came to this country in the late 1990s. She was raised in an agrarian culture with almost no formal education. She speaks very little English and either possesses such limited math skills or confidence in her skills of that sort as to preclude her from positions in a retail supermarket involving cash transactions or dealing with weights and measures. She is burdened as the sole breadwinner in her family as her husband apparently suffers from a disabling illness. As a result, Acosta regularly sought extra work in other Bashas' stores in order to supplement her weekly income.

Under Bashas system, the store directors are allocated a budget of hours each month which affects the monthly employee scheduling. Ordinarily, the store director will allocate a bank of hours to the various department managers who prepare the employee work schedules. The scheduling manager will first allocate at least 32 hours to the department's full-time

[47] Thus, Acosta recounted that Zamora called her to a meeting in the store manager's office 3 or 4 days after a meeting that unquestionably occurred on August 1, more than 2 months after Zamora left her acting CSM's position. On that occasion, according to Acosta, Zamora directed her to perform calculations so she could promote her to a cashier's position. Although Zamora did not testify, I find this claim by Acosta self-contradictory and unreliable.

employees and then divide the remaining hours among the department's part-time employees.[48] The principal factors other than the needs of the store that affect the number of hours a part-time employee receives in the scheduling process are store seniority and availability.

Part-time employees, such as Acosta, may solicit added hours by calling other stores for any available work. However, the Company requires the employee seeking added time to obtain authorization from the management of both stores so each store can maintain control of potential overtime work. In the past, Acosta received warnings for failing to properly notify management about her accumulated hours. According to Store Director Harper, the store managers have to rely on information provided by extra employees to determine whether overtime would be involved because such information cannot be determined from Respondent's highly sophisticated biometric timekeeping setup. The testimony by Sainz discussed below appears to unwittingly contradict Harper's assertions and has led me to conclude that the outside store management probably wants to hear about any possible overtime from the employee simply because they do not want to take the time or trouble to look up the number of hours the outside employee has already worked.

Soon after Acosta's return to store 20 in 2006 conflicts between her and Zamora broke out. Within a couple of months after her return, Harper issued Acosta a conference memorandum for "gossiping, spreading rumors and making threats towards a member of management." (R Exh. 24.) This warning was precipitated by Acosta's threat to kick Zamora's ass. Harper, who does not speak Spanish, used the store's bakery manager to interpret this conference memo line-by-line during the disciplinary meeting. The bakery manager later reported to Harper that within minutes after Acosta left the disciplinary meeting she threatened that she would get Zamora somewhere outside the store. No evidence shows Harper did anything about this threat.

Acosta began attending union meetings regularly in the spring of 2007 and continued doing so through that summer. She also talked to her fellow employees about unionizing the store. However, no claim is made that Acosta did anything prior to a meeting at the store on August 1 that dealt with the union organizing campaign to openly disclose her pro-union sympathies to management. The managers who worked with her uniformly claim they knew nothing about her union activities or sympathies until well after her transfer to Store 163.

Meanwhile, in June 2007 Harper issued another conference memo to Acosta for separate remarks she made to a customer and to two cashiers that they considered uncomplimentary. The written June 13 disciplinary document states that a female customer complained because Acosta stated to her, "[Y]ou like old guys and he [the man accompanying the female customer] must have money for you to be with him." Harper said the customer had telephoned him about the remark. The memo also states that Acosta remarked to two cashiers at the store that they "must be lesbians because they want to go out dancing together." The memo directs Acosta to "stop all non productive conversations" and to quit "gossiping or spreading rumors." It concludes by reminding Acosta to follow directions given by the cashiers and threatens further disciplinary action including suspension or possible termination for failing to do so. This disciplinary action is not alleged as unlawful.

In June and July 2007, Bashas began attacking the UFCW on various grounds in a series of flyers it distributed to employees at the unrepresented stores. One, purporting to cite a

[48] Bashas guarantees its full-time employees at least 32 hours per week. The part-time employees have no guarantee.

ruling by a federal district court, charged that "UFCW Local 99 does not respect women." (GC Exh. 59.) Another, by Bashas' president, guaranteed that no employee "will be discharged or otherwise discriminated against because he or she supports or refuses to support any union. (GC Exh. 60.) This flyer also charges that the Union is engaged in scare tactics and that it wants to destroy the employees' trust in their company. Other flyers attacked the Union's efforts to obtain an employer neutrality agreement and card check recognition. (GC Exhs. 61 and 62.) One focuses on job losses at retail markets represented by UFCW unions. (GC Exh. 63.) One deals with the southern California food industry strike in 2004. (GC Exh. 64.) The remaining two provide comments purporting to be from employees at a store that decertified a UFCW union and a report of an NLRB settlement of a Butte, Montana, dispute charging, in effect, that a UFCW union allegedly failed to recognize membership resignations. (GC Exhs. 65 and 66.)

On August 1, Michael Vital, a corporate official who oversees the meat managers in the retail stores, conducted a meeting in the produce prep room at store 20. It started at about 10 a.m. and lasted about an hour. Store Director Harper and 10 employees, including Acosta, attended. (GC Exh. 24.) Vital spoke to the employees in Spanish. He reviewed the benefits Bashas provided employees and talked about some promises the Union purportedly made during the organizing campaign. Vital also played a video of Eddie Basha, the Company's founder, speaking against the Union.[49]

Acosta recalled that Vital[50] asked, among other things, for the employees to raise their hands if they had received a visit at home from a union agent,[51] and that he told employees that they should not answer the door if a union agent came to their home. Acosta remembered that employee Rosa Gonzales stood up and said that she knew about the union knocking on doors but the person who really knew was Sophia Martinez, a store 20 cashier at the time. Acosta recalled that Martinez then stood and admitted that she had attended union meetings "because she was in a free country, and that she could go to the meetings that she wanted to" and that the Union provided a lot of support for the workers. Acosta claimed that she too voiced her support for unionizing by standing and stating in a loud voice that it would be "a thousand times better to pay for the Union."

Vital denied that he asked the employees to raise their hands if a union agent had visited their home. He also denied telling employees that they should not answer the door if they received a visit from a union agent. Vital agreed that Gonzales and Martinez spoke out but he

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[49] No one testified about the content of the Eddie Basha video but Arturo Mendoza, a Distribution Center employee, described a video by Eddie Basha shown to employees there. According to Mendoza, Eddie Basha said that Bashas had been "doing good" without a union and asked rhetorically why they needed a union now when they did not need a union when he started the Company. Tr. 503–504

[50] Acosta could not remember the name of the person who conducted the meeting but she said that he introduced himself as being "in charge of all of the meat departments" which represents a somewhat accurate description of Vital's job.

[51] During cross-examination, counsel for Respondent noted that Acosta made no mention of the request to raise hands in any of the three pre-hearing affidavits she provided to the General Counsel's office. Occasionally, omissions of this kind result from the affidavit-taking process. However, I find this omission of some significance. General Counsel relied almost exclusively on Acosta's claims about this meeting for the employer-knowledge element of his *Wright Line* burden of persuasion concerning Acosta's subsequent transfer. In these circumstances, it strikes me as almost inconceivable that an interviewer with even minimal skills would not have uncovered such significant information over the course of three interviews.

claims that Acosta did not speak at all during the meeting.[52] Harper supports Vital's claim that Acosta did not speak up and even Acosta acknowledged that she did not know whether any of the managers present heard what she said.

Acosta asserted that in the days following the August 1 meeting she received informal reprimands from CSM Sainz about her extra work both at store 20 and at other stores. Sainz acknowledges that she spoke to Acosta about working beyond her schedule at store 20 but her account differs significantly from that provided by Acosta.

According to Acosta, the first mention of her work at other stores occurred when Sainz summoned her to the store office. She said that Sainz told her that she was "always crying for hours," and that she "was going to have a lot of problems with the Company." Acosta claims that Sainz even said that she could not work at other stores. Sainz called Acosta to the office again about 3 or 4 days later, this time with Store Director Harper present. Sainz accused Acosta of staying 15 minutes beyond her scheduled quitting time for that day. Acosta maintained that when she tried to explain that she wanted to finish cleaning the area where she had been working Sainz told her she did not want any excuses and that she did not want her working beyond her scheduled time. Acosta then claimed that Harper approved her extended work that particular day but that Harper also told her during this meeting that he did not want her exceeding her scheduled shift by "not even a minute." Later in her testimony, Acosta said Sainz called her to the office and she told me that she was going to punish her because she had stayed 15 minutes too long. When Acosta protested that she still had two more scheduled hours, Sainz said: "Punch yourself out and leave already. I don't want any excuses, now."[53]

Acosta left as directed and went to the corporate office where she met with Pearl Castillo, a human resources representative. Although their 2-hour meeting covered a number of subjects, Acosta's most immediate problem obviously concerned her loss of 2 hours of work that day. On that matter, Castillo sided with Acosta and called the store to have her hours restored.[54] Castillo later confirmed that this had been done.

Meanwhile, between the time of the August 1 meeting and Acosta's transfer a month and a half later, Sophia Martinez, the employee who spoke in favor of the Union at the August 1

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[52] Vital characterized the Gonzales-Martinez exchange as a "squabble." He said that Gonzales asked Martinez why she had not said anything about the union meetings being held at her home. Vital claimed that he interrupted their exchange up because he "didn't want it to go any further."

[53] Saniz confirms a few elements of Acosta's story but her account differs considerably. Sainz recalled that a couple of weeks after she transferred to store 20, or well before the August 1 meeting, she noticed Acosta working beyond her scheduled shift by 20 to 30 minutes so she spoke to her about it out on the sales floor. During their exchange, Acosta told Sainz that Harper had approved her practice of clocking in early or out late but Sainz said that Harper later denied that he had done so. After that, Sainz spoke to Acosta again about extending her scheduled hours on her own, this time in the office. Sainz told Acosta what Harper said and instructed her to only work as scheduled.

[54] According to Castillo, the store director lacks authority to send an employee home before the end of the person's scheduled quitting time. She said that she called the store and instructed either Harper or Sainz to restore the 2 hours Acosta lost.

meeting, was terminated.[55] When a customer asked Acosta about Martinez' whereabouts, Acosta responded by saying that Martinez had been fired for speaking up about the Union.

One day around the middle of August, Sainz claims that she discovered while reconciling employee time records that Acosta had worked overtime at another store. According to Sainz, the work had been performed on a day that Acosta arranged to have off from her regular store 20 schedule in order to visit her son. That discovery lead Sainz to issued Acosta a written, note-to-file warning. (R Exh. 21.) In the warning, Sainz specifically stated "it is acceptable for you to work extra hours at other stores" but the company policy required her to tell that store's management about her home-store schedule and disclose whether the added hours would involve overtime. The warning makes no mention about the claim that Acosta sloughed off her regular schedule to work at another store.

According to Acosta, Sainz also verbally warned her on this occasion about any further talk concerning Martinez. Acosta claimed that Sainz told her to stop going "about mentioning Sophia's name with any customer or with any co-worker." Sainz denied this claim by Acosta. She said the only discussion relating to Martinez between the two of them occurred when Acosta asked her on one occasion following Martinez' termination why her name no longer appeared on the schedule posted in the breakroom. Sainz said she responded only that: "She is just not on the schedule anymore." When Acosta pressed for an answer, Sainz claims she told Acosta there were matters that management could not talk about because they were confidential.

Throughout this period, the ill-will between Acosta and Zamora continued. Eventually it led to Acosta's involuntary transfer to another store. Acosta brought this up during her lengthy conversation with Pearl Castillo, a Food City human resources specialist. That turned out to be the first of three meetings and one phone conversation between Acosta and Castillo over the next month that dealt largely with the relationship between Acosta and Zamora.

Acosta complained to Castillo about Zamora calling her names, being mean, and bossing her around in a disrespectful manner. Acosta also told Castillo in one or more of their meetings that Zamora had problems with other store 20 employees as well. Castillo looked into that claim by Acosta and confirmed it to be true. (Tr. 2330.) In her testimony, Castillo attempted to claim (or was led into such an attempt) that Acosta raised the notion of transferring to another store in order to get away from Zamora. She testified as follows when first asked by Respondent's counsel if they had discussed the possibility of Acosta transferring:[56]

> Q. Was there any discussion between the two of you in that meeting, about a possible transfer or a change to a different store?
> A. I don't recall.
> Q. Did the—when the two of you were discussing the disputes between Ms. Zamora and Ms. Acosta, did either you or Ms. Acosta bring up the possibility of changing store?
> A. We talked—she talked about going to other stores to work.
> Q. What did she say?

[55] Sainz testified that Martinez ceased working at store 20 near the end of August because there were "problems with her I-9 form." There is no evidence a NLRB charge was ever filed concerning Martinez.

[56] This exchange Castillo describes occurred on the day Acosta came to see her about losing 2 hours of work.

A. She said that she would go to 105, which was closer to her home, and also to—she would go to 162.
Q. Did she tell you whether she had worked at 162 before?
A. Yes, she did.
Q. Did you raise the subject of going to 162, or did she?
A. No, she did.
Q. Did you raise with her, the identities of the numbers of any stores that she could go to, in that meeting?
A. No. She is the one that told me what store that she would like to go work at?
Q. At this meeting, as far as you know, was there anything in the works at Bashas' to transfer Ms. Acosta to another store?
A. No, there wasn't.
Q. Why was the subject of transfer—how did it rise between the two of you at all?
A. She is the one that said that she would work at other stores.
Q And why was she going to work at other stores, if she was enjoying Store 20"?
A Because she didn't want—she couldn't work with Victoria anymore.

(Tr. 2301–2302.)

After receiving the note-to-file (R Exh. 21) relating to her work at other stores, Acosta went to visit with Castillo again. Castillo estimated the meeting occurred in late August and that their meeting lasted about an hour. [57] Castillo recalled that Acosta complained about having problems because of her work at other stores, and about her continued mistreatment at the hands of Zamora. Castillo also said that Acosta made mention of Martinez, Gonzales, and the August 1 meeting conducted by Vital at store 20. The following is Castillo account.

Q. Okay. Do you remember a discussion during that meeting in late August 2007, where the names of employees Rosa and Sophia came up?
A. Yes, I do.
Q. And who brought them up?
A. Maria did.
Q. And what did she say about those two women?
A. I can't recall.
Q. All right. Do you recall whether Ms. Acosta referred to a meeting at which the two women and she had been present?
A. Yes.
Q. And did Ms. Acosta tell you any statements that had been made by anyone in that meeting?
A. That Rosa told her that Sophia was in the Union.

(Intervening Objection)

Q. BY MR. KATZ: All right. And did Ms. Acosta tell you when and where that statement was made, that Sophia was in the Union?
A. It was at a meeting that the store was having.
Q. And who was running the meeting?
A. Mike Vital.

[57] R Exh. 21 was purportedly prepared on August 14. However, it bears the signatures of Harper and Sainz that are dated August 24.

Q. And she was reporting to you, a statement that Rosa had made about Sophia, is that right?
A. Yes.
Q. Okay. Did Ms. Acosta say who else was present when the statement was made?
A. Can you repeat that?
Q. All right. You referred to a meeting. And I just want to be clear on this.
A. Uh-huh.
Q. Did Ms. Acosta tell you that the statement had been made in the meeting, or at some other time and place?
A. That it was done at a meeting.
Q. All right. And this was a meeting run at Store 20 by Mr. Vital?
A. Yes, it was.
Q. Did Ms. Acosta tell you that she herself had said or done anything in that meeting?
A. No.
Q. Did Ms. Acosta tell you that she herself had any interest in the Union?
A. No. She did not.
Q. Did you ask her in any way, about her feelings about the Union?
A. No, I did not.
Q. Did she offer to you any statements regarding her own interests or conduct in the Union?
A. No. She did not.
Q. Can you remember what it was in your discussion with Ms. Acosta, that brought up this comment that Rosa had made about Sophia?
A. (No response.)
Q. Do you know what led to it?
A. I can't recall.
Q. During that entire meeting that you had with Ms. Acosta, was there anything else, besides what you testified to, said about a Union?
A. No.
Q. Did Ms. Acosta at any time during that meeting, indicate her own interest in the Union?
A. No. She did not.

Tr. 2308–2310.

Acosta disputes Castillo's denials regarding a discussion of her own union sympathies. Acosta said she told Castillo of her belief that her problems at store 20 began after she had spoken out in favor of the Union at the August 1 meeting. Acosta also claims that she told Castillo that she thought about going to the Union to seek help with the problems she had discussed with Castillo but that Castillo assured her she would "fix the problem" and that she should not seek help from the Union or anywhere else.

In early September, Acosta went to the corporate facility to speak with Castillo yet again but found Castillo out of her office. A receptionist arranged for her to meet with Robert Ortiz, the Food City sales and marketing vice president. Acosta complained to Ortiz at length about Zamora's abuse. She told Ortiz that she sought help earlier from Castillo and said that she planned to seek the Union's help if he could not help. Acosta claims that Ortiz promised help and urged that she not go to the Union or anyone else about this problem.

Ortiz took notes as Acosta complained and later spoke to Rae O'Connor about his discussion with Acosta. Ortiz said he had nothing further to do with the problem after he learned that O'Connor already knew about the situation. Ortiz denied that Acosta said anything about a union to him. He also denied that he told Acosta that he would take care of her problem and that she should not go to the Union.

Meanwhile, O'Connor said Zamora called her four or five times complaining about Acosta. O'Connor summarized what she learned from Zamora this way:

> Q. What did Mr. Zamora tell you about her issues of Ms. Acosta?
> A. That she was harassing her, was—that she had previously threatened her, that she was gossiping about her, *going around the store asking other people if she was mean to them*, and talking about—badly about her.
> Q. Did you investigate?
> A. I talked to—I asked her if there were any witnesses. There didn't seem to be any witnesses, so I relied on the store director, and the other managers. I talked to them about it.
> Q. When did these events take place, and by the events, I mean the conflicts between Ms. Zamora and Ms. Acosta.
> A. When they started calling it was around July and August.
> Q. Of 2007.
> A. Yes, but when we got to talking, after a while, it became apparent that it had been going on for quite a while, both by what Victoria said to me and by what Maria said to Pearl.
> Q. Are you saying that the calls that you got, that you described, occurred the beginning of July of 2007?
> A. Yeah, July and August, right around there.

(Tr. 1484–1485, emphasis added.)

O'Connor, the key player in the decision to transfer Acosta, said both employees "were at it," and that company could not say "that Victoria was the bad one or Maria was the bad one." Although O'Connor's testimony implies considerable simultaneous consultation with Castillo, she made no mention in her testimony about the conclusion reached by Castillo after she looked into Acosta's allegation that other store 20 employees could not get along with Zamora. O'Connor felt it only "fair" to transfer both employees to other stores. Swanson and Konicke purportedly approved her recommendation. O'Connor said that this determination had been made early on. Store Director Harper also claimed these transfers were involuntary but he left store 20 before the date Zamora applied for a transfer.

On August 27, Zamora submitted a formal transfer application to store 106, located 3 miles north of store 20, on a Bashas' form titled "Request for Transfer and/or Promotion." (GC Exh. 44.) Zamora listed "change of environment" as the reason for transferring. Zamora's transfer was approved around September 10 or 11, and she started work at store 106 on September 16.

O'Connor claims Zamora submitted her store 106 transfer after having been told that she would be transferred to another store. The Company's written policy statement concerning requests for transfers or promotions (see GC Exh. 67) strongly indicates that other company officials would have known about and been able to verify the alleged involuntary nature of Zamora's transfer. No other witness likely to have firsthand knowledge of this corroborated O'Connor's claim. No evidence shows that Acosta knew about Zamora's pending transfer at the

time of her various meetings with Castillo. By the time O'Connor explained to Acosta that she would be transferred, the Zamora transfer had been approved and she had begun work at store 106. No one requested that Acosta complete a request for transfer and/or promotion Form.

Meanwhile, following Acosta's meeting with Ortiz, Castillo called her and asked that she come to the human resources department for a meeting with O'Connor and herself. During this meeting, Acosta claims that she was told to find another store, that she would be transferred to a different store in a new department with a lower salary. She claims that O'Connor told her that she was being transferred because she had made complaints about Victoria and Rosa. Acosta said they explained that they had to transfer her "from the store in order to find out who was the bad one, me or Victoria." Acosta protested being transferred. She says she told O'Connor and Castillo that "it wasn't just with me that [Zamora]was bad, that Victoria was bad with everybody, that she treated us badly" and that she was "[a]lways swearing at us and damning us."

This meeting, Castillo recalled, concerned the problems that Acosta had been having with Zamora. She said they "suggested that maybe it was possible she wanted a transfer to another store or a department" since she was having so many problems with Zamora. Castillo claimed that Acosta mentioned stores 105 and 162 as locations where she would transfer without any suggestion from O'Connor or herself. Castillo asserted that Acosta told them she had a reliable car and never raised any concerns about the 14-or 15-mile commute an assignment to store 162 would involve.[58] Castillo said they told Acosta that they could put her in the bakery, deli, or meat department at a new store. She said Acosta rejected all those potential assignments because she "would have to run a register."

Shortly after her meeting with O'Connor and Castillo, store 20 PIC Padilla called Acosta into the store office ostensibly to test her math skills apparently to determine if she could perform work requiring cash transactions with customers. While in the office, Padilla gave Acosta some documents that were in English and asked her to sign them. She refused since Padilla would not let her show them to her daughter first. However, Padilla purportedly told Acosta that the papers made it appear as though she "would have problems with the company and immigration." (Tr. 624.) Padilla denied making any such statement to Acosta. He also told Acosta that she was about to be transferred to another store but cautioned her against telling anyone that he said that to her.

Later, Sainz and Charles Bootman, the new director at store 20, informed Acosta that she was being transferred to store 162. Bootman's signature on the transfer document is dated September 20; Acosta signed it on September 21. Acosta said she was not given a specific reason for her transfer at this meeting. She said Sainz told her something to the effect that she "had to go to another store because [she] had a history." Acosta, who had worked for Bootman at another store, appealed to no avail for them to let her daughter come to their meeting to translate her plea that Bootman allow her to continue working at store 20. The transfer became effective September 23.

Diane Romero, the director at store 162, remembered Castillo called her in early September to ask if she could provide 15 to 20 hours of work weekly for a part-time custodian who "needed" to be transferred. Supposedly, Romero did not ask why Acosta needed to be transferred. Although the store already employed three custodians (two full-time, one part-time)

[58] Store 105 is closer to Acosta's home than store 20. However, the store director at store 105 told O'Connor that he had no room for a utility clerk, Acosta's classification.

Romero agreed to Acosta's transfer provided she was a part-time employee. Castillo told Romero she would talk with the employee and get back to her if the transfer was okay.

In the months preceding Acosta's transfer, store 162 had near record sales. According to Romero, the number of worker-hours corporate headquarters budgets for a store each month closely correlates to the trend in the store's sales. In September 2007, Romero estimated the number of hours store 162 allocated for custodial work ranged from 105 to 110 per week. But Romero claimed that soon after Acosta's arrival at store 162, sales and customer traffic at the store dropped off significantly and that resulted in the allocation of fewer worker hours to the store. Romero speculated that the sales reversal at store 162 beginning in the fall of 2007 resulted from the effects of a highly publicized State law imposing severe penalties for employing illegal aliens.

Romero meets with her management staff each Monday and allocates the amount of worker-hours available for each department for the following week. With this information the department managers allocate the available hours to the department employees and prepare a work schedule that is normally posted on Friday. Full-time employees are guaranteed at least 32 hours per week. If any hours remain after the full-time employees are scheduled, the department manager distributes the hours among the department's part-time employees on the basis of store seniority and the employee's availability. In this way, the less senior part-time employee will likely receive fewer hours even though a person such as Acosta might be available for work at almost any time.

Ray Valencia, the merchandise manager, supervises the custodians at store 162 and prepares their work schedules. He did not testify. No evidence shows that Acosta limited her availability in any manner. For that reason, and in view of her very aggressive pursuit of extra work throughout the relevant times, I infer that Acosta made herself available to work as many hours as she could get. However, the seniority rule used at least at store 162 would have made Acosta last in line for the assignment of hours to the custodians. According to Romero, the seniority rule coupled with the downturn in store sales admittedly resulted in fewer hours of work for Acosta at store 162.

But Romero's testimony points to other possible reasons for the reduction in Acosta's hours following her transfer. The scope of Acosta's duties as a custodian at store 162 were substantially more limited than were her duties as a utility clerk at store 20. Thus, Romero's testimony shows that until she complained vociferously about her limited hours and the union agents conducted an in-store demonstration one day in November on behalf of restoring her work hours, Acosta's assignments were limited to custodial work only. As previously noted, at store 20 she performed a variety of other tasks in addition to custodial work. Furthermore, Romero testified that the courtesy clerks, who are paid the minimum wage rate, perform some cleanup tasks that the store's custodians also perform.

Soon after her transfer, Acosta began complaining about the lack of hours. As time passed, her dissatisfaction grew and she began complaining about the commute distance and her uneasiness with driving such distances at night. Romero suggested that she attempt to find work at other stores and suggested a lengthy list of stores located between her home and store 162. The list did not include store 20. Romero acknowledged that Acosta asked several times to transfer back to store 20 but Romero admittedly did nothing to accomplish that request since, as she put it, "that was out of my hands." In February 2008, O'Connor came to store 162 with Acosta's original I-9 Form to obtain her acquiescence to a couple of corrections. On that occasion, Acosta, O'Connor and Romero had a 2-hour discussion concerning Acosta's desire to return to store 20. Nothing came of Acosta's effort to return to her former workplace.

b. Argument, analysis and conclusions

Complaint paragraphs 7(j) and (q) together allege Respondent violated Section 8(a)(1) and (3) by transferring Acosta from store 20 to store 162 on September 17 because of her union and her protected concerted activities. **Complaint paragraphs 7(o) and (q) and 8** allege that Respondent violated Section 8(a)(1), (3) and (4) when it reduced Acosta's hours beginning in early November. **Complaint paragraphs 6(r), (s), (t), (ff)**, and subparagraphs thereof allege a number of independent 8(a)(1) violations growing out of Respondent's actions toward Acosta.

Witness Credibility: The conflicting accounts provided by the witnesses are central to the determinations required by the Acosta allegations. The argument fashioned in the General Counsel's brief blithely assumes the veracity of the version of events provided by Acosta and ignores the many conflicting accounts altogether. Respondent's brief argues at some length that Acosta should not be credited where her testimony conflicts with that of management witnesses who appeared on the surface to be more coherent and credible. Respondent's brief cites Acosta's bias based on her active support of the Union, the poor quality of her testimony, and the lack of corroboration for her assertions as the basis for arguing that Acosta was not a credible witness. Respondent's contention that "Acosta's testimony was scattered, contradictory and nonresponsive" certainly has merit. To that litany, I would add her testimony occasionally became excessively self-serving. Put simply, the General Counsel's failure to produce other witnesses to verify Acosta's assertions even in some small way, or to provide argument in its brief why, despite her obvious shortcomings as a witness, her stories should be given credence over the contrary testimony of Respondent's witnesses made it particularly difficult to deal with wide-ranging complaint allegations that concern her.

It is inconceivable that anyone witnessing Acosta testify could miss the struggles she had in the relatively formal courtroom setting required for her testimony. Several of her answers were confusing or nonresponsive. Other answers indicated she did not grasp the question even as translated into her native language. A few of her answers were directly contradicted by documentary evidence; still others seemed exaggerated. Respondent's brief correctly notes that I recessed the hearing at one point and directed the counsel for the General Counsel, a fluent Spanish speaker, to emphatically instruct Acosta about the importance of listening to the question asked by counsel and answering the question asked.

By contrast, other witnesses who appeared in this aspect of the case (Harper, Sainz, Vital, Castillo, O'Connor, and Romero) possessed many of the personal skills Acosta so obviously lacks. Consequently, they made far better initial impressions. Regardless, I have ultimately concluded that the testimony provided by these more sophisticated witnesses contain damaging admissions, odd contradictions, improbable scenarios, and code-like remarks that have significance. On critical questions, Respondent too failed to provide corroboration that could have altered the outcome

Even though resort to an adverse inference for failing to call corroborating witnesses might not be appropriate under the circumstances here, the failure to buttress the testimony of a witness with Acosta's obvious limitations just cannot be ignored. The Board recognizes the significance of corroboration to the trier of fact. *Queen of Valley Hospital*, 316 NLRB 721 fn. 1 (1995) (adverse inference may not be drawn from the failure to call bystanders to corroborate unlawful conduct but a judge may properly consider the failure to call potentially corroborating witnesses as a factor in determining whether the General Counsel met the burden of proving a violation by a preponderance of the evidence). Under *Wright Line*, both parties have a burden of *persuasion*. That burden can never be met without reliable, supporting evidence.

Even though important portions of Acosta's testimony lacked the indicia of deliberate deception, I am very skeptical about the reliability of her unsupported testimony and reluctant to put stock in her account of events where contradicted by others whose testimony I found less demonstrably unreliable. However, where her version of the events is supported by an independent source of some sort (which usually came from Respondent's officials themselves), then I have relied on what Acosta said.

Acosta's transfer: As previously noted, Section 8(a)(1) prohibits employers from interfering with, restraining, or coercing employees guaranteed by Section 7. Section 7 not only protects employees who engage in, or refuse to engage in, union activity, it also provides that employees "shall have the right . . . to engage in . . . concerted activities . . . for the purpose of . . . mutual aid or protection." This statutory language protects employees from retribution by their employer when they concertedly seek to improve the conditions under which they work unless their concerted efforts are found to be unlawful, violent, in breach of contract, or otherwise indefensible. *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 17 (1962).

Respondent's officials admitted that they transferred Acosta because of her protests about Zamora's abuse and that they transferred Zamora because she complained about Acosta. Complaint paragraph 7(j) and (q) alleges that Respondent transferred Acosta because she "had joined, supported, or assisted the union and engaged in concerted activities, and to discourage employees from engaging in these activities." I find this allegation sufficient to consider separately the question as to whether Acosta's transfer resulted from protests she made concerning Zamora that are unrelated to her union sympathies.

As with 8(a)(3) discrimination cases, the Board applies the *Wright Line* causation analysis to 8(a)(1) concerted activity cases that turn on the question of an employer's motive for an adverse action against an employee. *Saigon Gourmet Restaurant*, 353 NLRB No. 110, slip op. at 3 (2009). Under that analytical model, the General Counsel has the burden of showing initially that the employee engaged in protected, concerted activities, that the employer knew about those activities, and that it harbored animus toward the employee because of those activities. If the General Counsel proves those elements and otherwise meets the initial burden of persuasion, then the Respondent's burden requires it to showing persuasively that it would have taken the same action against the employee even in the absence of the protected, concerted activities. If Respondent's affirmative defense fails, then a finding that the adverse action resulted from her protected concerted activities would be warranted.

The *Meyers* litigation[59] produced the Board's current view as to the meaning of the statutory term "concerted activities." In *Meyers I*, the Board explained that "concerted activities" as used in Section 7 requires that an employee's activity must be engaged in with or on the authority of other employees, and not solely by and on behalf of an individual employee. 268 NLRB 497. In *Meyers II,* the Board said its *Meyers I* definition encompasses those circumstances where an individual employee seeks to initiate or to induce or to prepare for group action, as well as the conduct of an individual employee who brings "truly group complaints" to the attention of management. 281 NLRB 887. No doubt the intervening Supreme Court decision in the *City Disposal* case[60] influenced at least a part of this clarification.

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[59] *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*); remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985); *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

[60] *NLRB v. City Disposal Systems,* 465 US 822 (1984) (holding that an individual invoking a collectively bargained right is engaged in concerted activity within the meaning of Sec. 7).

As *Meyers II* notes, the five majority justices *and* the four dissenting justices in *City Disposal* agreed that concerted activity also encompassed "individual employee activity in which the employee acts as a representative of at least one other employee." Id. at 885.

Ample support exists for Acosta's claim that she complained to the Food City management on at least three occasions about Zamora's abuse, i.e., name calling coupled with mean and disrespectful treatment. O'Connor admits that she decided to transfer both Zamora and Acosta because of their complaints about each other. Accordingly, if Acosta's complaints regarding Zamora were concerted in the statutory sense, a substantial basis exists to find her transfer unlawful on the ground that it interfered with her Section 7 right to engage in concerted activities for the purpose of other mutual aid or protection; if her protests concerned only herself, then her protests would not be protected by Section 7. Hence, a key question concerning Acosta's transfer is whether her complaints to management about Zamora's conduct are sufficiently linked to other employees so that it can be said that her protests were concerted in nature as that term is used in Section 7, or purely personal.

Castillo admitted that that on one or more occasions Acosta told her that Zamora also had problems with other store employees and that she found the claim about other employees to be true after she checked into the situation. Hence, I find Acosta's complaints about Zamora took on a concerted character when she expanded her complaints to include other store employees Zamora treated in the same manner. I further find that Acosta's references to other employees amounted to more than a mere incidental mention in the midst of an otherwise personal complaint because Castillo admittedly investigated Acosta's charge about others. Because of Castillo's corroboration, I credit Acosta's claim that she repeated her allegation about Zamora's abuse of others as well as herself when she met with O'Connor and Castillo and learned that she would be transferred.

O'Connor's testimony provides some indication that Acosta's complaints about Zamora had a concerted nature. She said that Zamora complained because Acosta had been "asking other people if she [Zamora] was mean to them." That testimony not only lends further credence to Acosta's claim that she protested Zamora's treatment of others, it also provides a clear basis for management's awareness that Acosta's consulted with her coworkers in connection with the complaints she lodged about Zamora. Accordingly, I find that as Acosta's complaints to Bashas' management about Zamora constituted protected concerted activities under Section 7 of the Act and that Bashas' management knew or should have known about the concerted nature of her complaints. *Dickens, Inc*., 352 NLRB 667 fn. 3 (2008) (employer knew or should have known employee presented a group complaint because the complaint on its face implied group involvement.)

Bashas' animus or hostility toward Acosta's protected activities is established by the nature of her transfer itself. Respondent quite clearly forced Acosta to transfer to store 162 against her will. Acosta's relocation involved a substantially longer commute, a loss of seniority that affected her regularly scheduled hours, and a more restrictive work environment for her limited abilities.[61] By contrast, the involuntary nature of Zamora's transfer is far from obvious.

[61] Castillo implied that Acosta voluntarily chose to transfer to store 162 because she could not get along with Zamora. I do not credit this claim as it conflicts with the testimony of O'Connor (who said transferring both employees was the "fair" thing to do) as well as store director Romero who said that she had not gone along with Acosta's appeals for help in returning to store 20 because that was out of her control. This evidence supports Acosta's assertion that Sainz told her bluntly that she would be transferred whether she wanted to or not.

Her transfer was accomplished on through an application process that gives the appearance that it was voluntary. Only O'Connor's self-serving assertion supports Respondent's claim that both were transferred involuntarily. In the absence of convincing corroboration for O'Connor's assertion that Zamora's transfer was involuntary, I do not credit her claim in light of the appearance of voluntariness exhibited by Zamora's transfer request. Hence, I find that ample evidence that supports a finding that Acosta's transfer resulted from her protected complaints about Zamora's of her and other store 20 employees.

Under *Wright Line*, Respondent had the burden of establishing as an affirmative defense that Acosta would have been transferred even absent her protected concerted activities. Although Respondent's managers may have mistakenly assumed that Acosta's complaints were purely personal, the admissions Castillo and O'Connor made showing that those complaints encompassed other store 20 employees as well and that they knew as much precludes a finding that the same action would have occurred in the absence of her protected activities. Respondent's mistaken belief is not a defense.

The weakness of Respondent's case is also underscored by the inconsistent claims O'Connor and Castillo made about who was to blame for the conflict between Acosta and Zamora. Central to the transfer decision, O'Connor said, was the fact that management got complaints from both Acosta and Zamora but could not determine who was at fault. However, Castillo acknowledged that when she looked into Acosta's claim that other employees also had trouble getting along with Zamora and found that to be true. Respondent made no attempt to reconcile this apparent inconsistency between the two agents most responsible for Acosta's transfer.

In its brief, Respondent argues that it "had a legitimate business reason for transferring Acosta due to her lengthy and escalating personal conflict with Zamora, especially given that Acosta had received multiple disciplines for threatening Zamora and spreading defamatory rumors about her." (R Br. 110.) However, these so-called threats and Harper's disciplinary action for them occurred well over a year before Acosta began complaining to Castillo about Zamora. These 2006 incidents took place while Zamora served as the acting CSM. In my judgment, this assertion about conduct plainly stale by any standard weakens Respondent's defense. The friction between Zamora, Acosta, and other employees that led to Acosta's involuntary transfer occurred after Zamora became a store cashier in late May or early June 2007. Respondent's reliance on Acosta's year-old threats is pure makeweight.

Respondent also argues that it transferred other pairs of squabbling employees. Apart from the highly self-serving testimony of O'Connor to that effect, Respondent offered no other evidence supporting such a practice. In addition, these transfers were anything but simultaneous. Zamora's transfer was arranged 3 weeks in advance of Acosta's involuntary transfer. But even if evidence of a similar past practice had been offered, it would be insufficient to justify adverse action against an employee who lodges and presses a complaint protected by Section 7 on behalf of herself and other employees about mistreatment by another employee.

In sum, I find that Respondent failed to meet the burden it had of persuading by a preponderance of the evidence that it would have taken the same action in the absence of Acosta's protected conduct. *Turtle Bay Resorts*, 353 NLRB No. 127, slip op. at 2 (2009), Therefore, I find Respondent violated Section 8(a)(1) of the Act by involuntarily transferring Acosta because she kept reiterating to management a complaint shared by several employees concerning Zamora's alleged abuse. *Alton H. Piester, LLC*, 353 NLRB No. 33 (2008). Having concluded that Respondent violated Section 8(a)(1) by transferring Acosta substantially because of her concerted protests, I find it unnecessary to consider the complaint allegation that

Respondent discriminated against Acosta in violation of Section 8(a)(3) as it would add nothing to the affirmative remedy applicable to Acosta.[62]

The reduction in Acosta's hours: Together, **complaint paragraphs 7(o) and 8** allege that Respondent violated Section 8(a)(3) and (4) by reducing Acosta's hours commencing in November because of her union activities and because Local 99 named her in an unfair labor practice charge. Respondent correctly notes *Wright Line's* applicability to Section 8(a)(4)'s allegations also. *McKesson Drug Co*., 337 NLRB 935, 936 (2002).

Even assuming that Acosta worked fewer hours following her transfer to store 162, I find that the General Counsel failed to prove an independent violation of the Act on that score as alleged in **complaint paragraphs 7(o) and 8**.[63] There is no direct evidence to support those allegations and the circumstantial evidence is insufficient to draw any conclusion that Respondent deliberately reduced Acosta's hours. Importantly, the General Counsel made no attempt to reconcile the variety of factors influencing the number of hours Acosta worked at any given time following her transfer to store 162. Accordingly, I recommend the dismissal of **complaint paragraphs 7(o) and 8**.

However, my remedy will provide that Acosta be made whole for any losses she incurred as a result of her unlawful transfer to store 162. To the extent that Acosta's assigned hours of work may have suffered by her transfer, I find that to be an incident of her transfer itself. Substantial evidence supports that likelihood. Romero admitted that her low seniority affected the number of hours she was assigned at store 162. In addition, there is ample evidence that Store Director Romero treated Acosta as a custodian when she transferred to store 162 rather than a utility clerk which she had been at store 20. As a store 20 utility clerk Acosta had a wider range of duties than the store managers permitted at store 162.[64]

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[62] However, on this score, Respondent's witnesses presented a united front in denying knowledge of Acosta's union sympathies until well after her transfer. Even though Vital and Harper may not have heard Acosta speak out for the Union during a hubbub at the August 1 meeting, the veracity of Respondent's witnesses beyond that is highly suspect. For example, Castillo admitted that she and Acosta discussed Sophia Martinez and Rosa Gonzales but in practically the next breath Castillo denied that they talked at all about the Union. I find that claim particularly incredible. The only connection that Martinez and Gonzales have to this case at all comes from the evidence about their tiff over the Union at the August 1 meeting. Castillo's acknowledgment that she and Acosta spoke about Martinez and Gonzales in one of their meetings strongly suggests some discussion related to the Union also occurred.

[63] Entirely aside from a lack of evidence regarding the nexus between Acosta's protected activities and the claimed reduction in hours, General Counsel's case also suffers from the failure to recognize and account for the fact that Acosta herself hustled many of her own work hours in any given week. For this reason, possible inferences that might be suggested by a change in the pattern of her assigned hours at her home store may not rationally carryover to the hours she worked at other locations.

[64] For example, Romero testified that store 162's courtesy clerks perform custodial work from time-to-time but that the store's custodians ordinarily do not perform the work of courtesy clerks. Acosta had no such limitations at store 20. In fact, the evidence shows that at store 20, Acosta received simple directions from the cashiers when working with them and this interrelationship with the cashiers lead to the friction she had with Zamora. There is little if any evidence that Acosta worked with the front-end cashiers at store 162.

Other allegations pertaining to Acosta: Complaint paragraphs 6(p)(1), (2), and (3) allege, in effect, that Respondent violated Section 8(a)(1) when Castillo promised Acosta improved benefits, and terms and conditions of employment if she refrained from union activity; solicited employee complaints and grievances; and "promulgated an overly-broad and discriminatory rule prohibiting its employees from seeking help from a labor organization, or any other organization.[65]

These allegations appear to pertain to the occasion when Acosta visited Castillo after Store Director Harper and CSM Sainz sent her home2 hours before the end of her scheduled shift. The General Counsel's brief cites *Aqua Cool,* 332 NLRB 95 (2000), for the proposition that an employer violates Section 8(a)(1) by soliciting grievances from employees and promising to remedy them. The brief also cites *Capital EMI Music*, 311 NLRB 997, 1007 (1993), enf. mem. 23 F.3d 399 (4th Cir. 1994), for the propositions that a supervisor violates Section 8(a)(1) by soliciting problems and grievances from employees and promising to remedy them so the employee does not need to seek help from the Union. But the General Counsel fails to point to any evidence regarding grievance solicitation by Castillo. Even if one relies entirely on Acosta's account of this meeting, as the General Counsel would have me do, the evidence shows that Acosta went to Castillo seeking her intervention to solve the problems she had with the store management and Zamora rather than the other way around. Accordingly, I find that no solicitation occurred here that would interfere with, restrain, or coerce Acosta in the exercise of Section 7 rights. Therefore, I recommend dismissal of **complaint paragraph 6(p)(2)**.

A sharp dispute exists as to what Castillo said that day after Acosta launched into her complaints about Zamora. Acosta claims that Castillo told her she would fix the Zamora problem and, with the prod from the counsel for the General Counsel in the form of a leading question, Acosta said that Castillo told her not to "seek out any help, either in the Union or anywhere else, that she was going to help me—that she was going to fix that problem." (Tr. 610.) Castillo denies that Acosta disclosed any intention of going to the Union for help or that she discouraged Acosta from seeking union help or help from any other source. I find Acosta's testimony lacks sufficient reliability on this point to conclude that the General Counsel has proven the allegations in **complaint paragraphs 6(p)(1) and (3)** by a preponderance of the evidence. For this, and the added reason that Acosta's testimony does not warrant a conclusion that Castillo promulgated a "rule," I recommend the dismissal of **complaint paragraphs 6(p)(1) and (3)**.

In **complaint paragraph 6(q)(1)** the General Counsel alleges, in effect, that Robert Ortiz promised Acosta "improved terms and conditions of employment" in mid-September 2007 if she refrained from union activity. **Complaint paragraph 6(q)(2)** alleges that Ortiz also orally "promulgated an overly-broad and discriminatory rule" preventing Acosta from seeking help from the Union. Both allegations grew out of the mid-September audience Acosta had with Ortiz. Again, no evidence supports a conclusion that Ortiz established a "rule" of any kind. At best, he

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[65] Here and there throughout the complaint, the General Counsel alleges in broad terms that Respondent's agents "promulgated overly-broad and discriminatory rules" and then produced evidence that limited to a simple, extemporaneous statement by a supervisor to a single employee that had no relationship to anyone else or any other situation. This exaggerated pleading style is puzzling, annoying, and misleading. But my personal reaction aside, it simply ignores the requirement of the Board Rule 102.15 that a complaint provide "a clear and concise description of the acts which are claimed to constitute unfair labor practices." By perverting the ordinary meaning of the word "rule" to such an extreme degree, the General Counsel's overblown pleading unnecessarily risks due process claims.

told one person not to do one particular thing on one specific occasion for one particular reason. Regardless, Acosta asserted that Ortiz also advised against going to the Union because he would take care of her problem with Zamora. Ortiz denied Acosta's claim. As previously articulated, I have serious reservations about the reliability of Acosta's account about this particular matter. Her claim that two separate management officials responded to her complaints about Zamora with nearly identical words on two very distinct occasions strikes me as highly improbable. For that reason, and because I gained a positive impression of Ortiz' veracity while testifying, I have fewer reasons to question his reliability than I do Acosta's. Accordingly, I find that the General Counsel failed to prove the Ortiz allegations by a preponderance of the credible evidence and, therefore, I recommend they be dismissed.

Complaint paragraph 6(r)(1) alleges that Castillo and O'Connor threatened to change Acosta's job classification and reduce her pay because of her union and concerted activities. **Complaint paragraph 6(r)(2)** alleges that they threatened to transfer her to another store because of her union and other concerted activities. Inasmuch as Castillo and O'Connor told Acosta at their mid-September meeting that she would be transferred because of the protected complaints she made about Zamora, I find that Respondent violated Section 8(a)(1) as alleged in **paragraph 6(r)(2)**. Although there may have been some discussion concerning Acosta working in other parts of any new store that might result in a lower pay rate, I find the evidence insufficient to conclude that the two managers threatened to take such action in conjunction with her transfer particularly where, as here, I cannot fully rely on Acosta's testimony without independent verification. As such verification is lacking, I recommend dismissal of **paragraph 6(r)(1)**.

Complaint paragraph 6(s) alleges, in effect, that in mid-September CSM Sainz "promulgated overly-broad and discriminatory rules" that prohibited its employees from discussing the discharge of a union adherent, discussing supervisors with other employees, and discussing union adherents during working time. As noted, Sainz denied Acosta's claims that she had been barred from speaking about union activist Sophia Martinez to other store employees or to customers. For reasons already detailed, I am unwilling to rely on Acosta's account in the absence of some type of substantiation that is lacking here. Accordingly, I find that General Counsel has failed to prove **complaint paragraph 6(s)** by a preponderance of the credible evidence. Therefore, I recommend dismissal of this allegation.

Complaint paragraph 6(t) also pertains to Acosta. It alleges that PIC Padilla threatened Acosta with various reprisals during the course of their September 20 conversation in the office at store 20 because of her union and other concerted activities. However, in his brief the General Counsel claims only that Padilla's statements to Acosta about her immigration status constituted a veiled threat of discharge because Padilla had no reason to suddenly threaten her about having immigration problems. (GC Br. 46.) The brief makes no claim that Padilla threatened Acosta with a transfer to another store as is alleged in the complaint and I find no such threat was made. As to the immigration statement, I credit Padilla's denial of the statement attributed to him by Acosta.[66] But even assuming the reliability of Acosta's account, I find the inference of a threat drawn by the General Counsel irrational and unreasonable. Around the time of her transfer to store 162, the Company discovered a mistake in Acosta's

[66] Acosta's testimony about her exchange with Padilla again illustrates her inability to reliably recall details. After she refused to accommodate Padilla's request to perform some test calculations, she testified that Padilla told her he would pass her wishes on to Harper. This conversation took place sometime near mid-September. By that time Harper had been reassigned to another store for almost a month.

original I-9 form. Although it is not at all clear that the document was sent to store 20 for correction initially, the fact remains that the full context of the exchange strongly indicates that Padilla only attempted to explain the purpose of the document he had asked her to sign. In view of this conclusion, I find it unnecessary to address Respondent's argument that Padilla was not a supervisor within the meaning of Section 2(11) of the Act at the time of these events. Accordingly, I recommend the dismissal of **complaint paragraph 6(t)** in its entirety.

In **complaint paragraph 6(ff)** the General Counsel alleges that in February 2008 O'Connor "intimidated and harassed" Acosta because she engaged in union and other concerted activities "by subjecting [her] to an unwarranted investigation and interview regarding [her] authorization to work in the United States." I find this allegation lacks merit. The evidence shows that an erroneous entry was made on Acosta's original I-9 form at the time of her original employment with Bashas. In February 2008, O'Connor went to store 162 to correct the entry and obtain Acosta's initials for the correction. O'Connor's visit had an entirely legitimate business purpose which she completed without any intimidation or harassment. Therefore, I recommend dismissal of **complaint paragraph 6(ff)**.

C. Issues Involving Bashas' Distribution Center

1. Background

The General Counsel has alleged that Respondent's managers and supervisors violated Section 8(a)(1) by a variety of statements and actions designed to quell the union activity at the Chandler Distribution Center. The General Counsel also alleges that Respondent violated Section 8(a)(3) of the Act by suspending DC employee Ramon de la Torre; by issuing a written warning to DC employee Ramon Moroyoqui; and by outsourcing the "baler" operation performed at that location.

At the time of the hearing, Respondent employed slightly more than 700 employees at its Chandler Distribution Center. The warehousemen, mostly forklift operators who place and retrieve goods kept there, make up the largest single group. In addition, until late January 2008, Respondent employed a group of approximately 30 employees classified as balers who engaged in a variety of reclamation activities describe in more detail below. The remaining classifications included utility specialists (custodians), truckdrivers, truck mechanics, and a few tire and lube employees.

Michael Basha, senior vice president of logistics, oversees all DC operations. Warehousing vice president Donnie Felix reports to Basha. Steve Schrade manages the DC human resources department.[67] Cash Eagan and Mel Kelley[68] serve as the dry goods warehouse receiving and shipping managers, respectively. About 10 supervisors report to them. John Hansen serves as the receiving manager in the produce (or refrigerated) warehouse and Jamie Vialobos is the shipping manager in the produce side.[69]

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[67] Schrade answers to both Michael Basha as well as Vice President Gnatt.

[68] The transcript is corrected to reflect the proper spelling of Kelley's surname as reflected in a document he prepared. See GC Exh. 4.

[69] The morning shift handles the bulk of the dry goods receiving work and the afternoon shift handles the bulk of the shipping work. For this reason, Eagan and Kelley are frequently referred to as the AM and the PM manager, respectively. Presumably the same is true of the refrigerated warehouse.

Eagan and Kelley also had responsibility for the baler operation until it was outsourced. No specific supervisor was assigned to the baler operation but any available supervisor might provide direction if it became necessary. For the past 6 years or so David Lizarraga has been the baler leadman on the afternoon (11:30 a.m. to 8 p.m.) shift. Ramon de la Torre, a baler employee and an alleged discriminatee (1-1/2-day suspension), also regularly served as the baler leadman on the afternoon shift 2 days a week (Sunday and Monday) when Lizarraga did not work and on other days when Lizarraga was absent for other reasons. General Counsel alleges Lizarraga is a Section 2(13) agent in order to make Respondent responsible for a statement Lizarraga purportedly made to de la Torre. Respondent denies Lizarraga's agency status.

Respondent's warehouse setup consists of two attached buildings, one used for warehousing refrigerated items, the other used for warehousing dry goods. Both buildings have delivery docks for the receipt of goods. Since mid-2005, employees of an outside contractor, World Super Service (WSS), have unloaded and lumped deliveries from Bashas' vendors. This outsourced function, performed at the delivery docks, includes removing the goods from the delivery trucks and breaking them down. Thereafter, those employees lump the deliveries into configurations that will fit the warehouse shelves. Thereafter, Bashas' forklift operators transport the goods from the dock area to an assigned location in the warehouse. Later, Bashas' order pickers pull items from the stored locations when needed. Other Bashas employees load the company trucks with those goods and Bashas drivers transport them to its retail stores. Around the time of the events described below, Bashas shipped in the range of 13,000 cases a day from the Distribution Center to its retail stores.

The drivers transport a sundry of items back to the Distribution Center from the retail stores that are unloaded on the baler dock, a dedicated portion of the dry goods warehouse dock. These returned items include pallets, empty boxes and milk crates, and damaged or outdated merchandise. The baler employees offload these items at an area of the dry goods delivery dock reserved for Respondent's reclamation activities. Thereafter, the baler employees clean the trailer and begin sorting the returned merchandise and materials. Respondent recycles some of the materials, such as the pallets, returns some of this merchandise to its vendors, and forwards the rest, including any broken pallets, to another warehouse located in Ocotillo, Arizona. The employees there salvage and repackage useable goods, repair pallets, and discard the unusable items. Employees at both locations "bale" the empty boxes using a machine designed for that purpose.

For several years, UFCW representatives have maintained contact and, from time-to-time, held meetings with a small cadre of DC employees. The Company's changes to its medical insurance program in 2006 triggered increased attendance at the Union's meetings. Arturo Mendoza, a longtime DC employee who had attended the union meetings for several years, noticed more and more employees attending after the 2006 changes. Initially those changes occupied a lot of the discussion at the union meetings, but other complaints soon began to be voiced. They included the increased production requirements for the order selectors in the dry goods warehouse, stricter enforcement of rules about talking during worktime and the amount of time spent in the rest rooms, the discontinuance of double time for work on holidays, the reduction of overtime, and the condition of warehouse shelving.[70]

[70] Mendoza claimed that improperly secured shelving often sway when loads are placed on the top shelves and that drivers have narrowly missed injury when the shelving collapsed.

The UFCW had commenced an active organizing effort at the DC by mid-April 2007. Organizers met with interested employees at a convenience store adjacent to one edge of Respondent's DC property a couple of times a month. In addition, several prounion employees distributed union literature around the plant and in the "bullpen," an outdoor smoking area. Walter Henyard, a baler employee and an early union sympathizer, passed out union flyers and pamphlets in the bullpen and distributed cards inviting employees to union meetings. By June, Edward Hollands, a security guard, warned Henyard that he would get "in trouble" for distributing union literature if observed on the DC's security cameras.

Later, prounion employee sympathizers became more visible. Occasionally, groups of prounion, distribution center employees wore T-shirts bearing the UFCW logo to work. The Union also sponsored safety initiatives, some of which I discuss in more detail below. By July and August 2007, the Union's employee supporters formed an ad hoc employee health and safety committee that conducted a safety survey among DC employees. Later, a few of the pro-union employees succeeded in pressing OSHA and a related State agency for onsite inspections at the DC that resulted in a few citations against the Company for minor safety violations.

Company officials plainly knew of the Union's emerging organizing effort by at least mid-June. David Vasquez, a Distribution Center supervisor, wrote a detailed Note to File dated June 15 that sets forth a report from an employee about the union activities of several other employees. (GC Exh. 34.) Schrade admitted receiving this report.

After recognizing the increased organizational activity, company officials conducted a series of training sessions for managers and supervisors (2(11) training) followed by captive audience meetings for employees in August. Schrade brought a Hungry for Respect flyer to the 2(11) training session on July 17. The flyer included a picture of some Distribution Center employees. A few supervisors at the meeting identified for Schrade employees who appeared in the picture. At the hearing, Schrade remembered that supervisors had identified Jaime Lazaro, Ramon de le Torre, and Jose Rojas from the photos in the Hungry for Respect publication.

In August, Mendoza attended a captive audience meeting conducted by Schrade and Juan Grano, a former DC employee who worked in the human resources department at the time. After showing the Eddie Basha video described above, Schrade spoke to the employees. He continued with the no-need-for-a-union theme introduced by the video and spoke about the amount of dues UFCW employees would earn if that union organized the Bashas' employees. Schrade invited employees who had a bad experience with a union to stand and tell everyone about it. Mendoza described what followed:

> There was one guy that raised—I can't remember exactly what he said about the Union. But he asked if anybody else had questions and I raised my hand, and he wouldn't let me ask any questions. Then when a good question was asked, he would say, they would get back on that question, or we could come to the Human Resources and we could sit down and talk about that.

In August, a group of employees (variously estimated in size from 8 to 20 lead by Arturo Mendoza), including four from the baler dock, went to the warehouse administrative offices and asked to meet with Vice President Basha. The group had planned to present Basha with a safety-related petition signed by 66 employees. (GC Exh. 21) After consulting with Schrade,

Basha sent his secretary to tell the group that he would not meet with them without an appointment.[71] Someone in the group made an appointment for 2 days later but when Mendoza and others returned on the appointed day, they were told that Basha would only meet with the employees individually and not as a group. One of the employees, Mike Cantu met with Basha alone but Mendoza refused to give the petition to Cantu to deliver to Basha on the ground that Basha would not get the employee petition until he met with the employee group. The following month a delegation of employees, accompanied by union agents and news reporters, went to the Company's corporate headquarters for the purpose of delivering a safety petition to Vice President Gnatt. In November, two baler employees, Robert Smith and Jaime Lazaro, filed a complaint with the Arizona Industrial Commission under the Occupational Safety and Health Act. (GC Exh. 57, 58.) Agents from that agency conducted an onsite investigation at the warehouse and the agency later issued citations against Bashas for minor safety violations.

Messages opposing unionization appeared from time-to-time around the warehouse. When a Bashas' vendor catered food for warehouse employees in the fall, flyers containing reproductions of an uncomplimentary newspaper article about the Union's corporate campaign against Bashas appeared on the breakroom tables near the food.[72] (GC Exh. 20.) From time to time the Company included antiunion messages in the employee pay envelopes. Antiunion employees were responsible for other activities. For example, Manuel Garibay, a trainer at the warehouse, posted petition-like, signup sheets bearing the Company's logo on the breakroom bulletin boards for a few days in February 2008 seeking employee signatures opposing unionization.[73]

Michael Basha and Schrade both referred to rumors they heard in early November about a "Solidarity Day" the prounion employees planned for mid-November. Supposedly, on that particular day, the prounion employees planned to wear UFCW T-shirts to work in a display of support. However, they indicated the day came and went with only 10 or so employees participating.

In addition, a two-person counter-demonstration in the presence of two warehouse managers occurred in February 2008. At the time, prounion employees were distributing handbills protesting warehouse safety conditions and the outsourcing of the baler operation at a plant gate. Two maintenance mechanics, Oscar Padilla and Ray Miller, rode by on a company golf cart shouting epithets at the prounion protesters. A large handmade sign was attached to the golf cart bearing the words "No Union." Padilla claimed that he engaged in this counter-demonstration on his breaktime. A few days earlier, Padilla hung a letter-sized sheet of paper bearing the words "No Union" on a one-person "scooter" that he also uses in connection with his work around the warehouse. Padilla said he did that on a day when a significant number of pro-union supporters had worn their UFCW T-shirts to work. Shortly after these incidents, Padilla's supervisor forbade him from using the Company's equipment for his "advertising." Padilla claims that HR Manager Schrade also informed him on a couple of later occasions that he could not post antiunion signs on the Company's equipment.

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[71] As discussed below, Schrade suspected that the union agents stationed across the street from the warehouse were directing the employees through cell phone communications.

[72] Arturo Mendoza estimated that vendors cater food for the warehouse employees four to six times a year.

[73] The Company posts government-mandated notices to employees on these bulletin boards but it also allows employees to post notices of their private events and concerns.

2. Jose Torres and complaint paragraph 6(o)

Complaint paragraph 6(o) and its subparagraphs (1), (2), and (3) allege that Schrade interrogated employees about their union activities and sympathies, created the impression their union activities were under surveillance, and promulgated an overly broad and discriminatory rule ban on soliciting union cards during working hours. Allegedly, Schrade's conduct occurred sometime in August. Respondent's brief speculates that General Counsel adduced testimony from Jose Torres to support this allegation. (R Br.: 305, fn. 117.) The General Counsel's brief addresses no conduct by Schrade that occurred in August and makes no mention of Torres at all.[74] Accordingly, I have presumed, as did Respondent, this allegation probably pertains to Torres.

a. Relevant facts

Immediately following the first attempt by a small group of employees to present Michael Basha with a safety petition on August 22, Dry Goods Manager Kelley summoned Jose Torres, a second shift order selector and one of those who sought an audience with Basha earlier that day, to his office. When Torres arrived, Schrade and supervisor Juan Grano were present with Kelley. Grano served as a translator.

By Torres' account, Schrade began by saying that he had seen Torres in the group who attempted to meet with Basha "on the cameras" and that he had seen his name on the petition. Although it is not entirely clear what Schrade said next, I have inferred from the answer Torres' gave that Schrade then asked why the group had approached Basha.[75] In response, Torres told Schrade about some problems employees encountered with the operation of the pallet jacks. He said that he also mentioned there had been a dropoff in the number of orders he

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[74] In fact, General Counsel's brief made no attempt to correlate argument with any specific complaint allegation. A roadmap through the complaint allegations it definitely was not.

[75] Literally read, Torres' testimony, as translated, suggests that Schrade challenged Torres and others for having the temerity to seek a meeting with Basha. The testimony reads:

> A. Well, when I got there, there was Steve Schrade, but there was Mel Kelly, and Juan Grano translating.
> Q. And did someone say something to you?
> A. Yes, Mr. Steve told me that he had seen me as one of the people on the cameras that had approached Mike Basha, and has seen my name on the petition, and how was it that I could approach Mike Basha to go and talk to him about security.
> Q. And did you answer him?
> A. Yes, I did answer him.
> Q. What did you say?
>
> (Intervening colloquy during which the interpreter explained that Torres had been using a Spanish word that could mean "security" or "safety" in English.)
>
> A. Yes, I told him about the problems that we were having about the pallet jacks. Some of them didn't break. Others once you released them, would fall over or turn off to a side, and then I also commented to him that the orders had been reduced, as far as my job is concerned.

received. Kelley promptly denied that the orders had been reduced and explained how Torres could check on the orders. Schrade said nothing further.

According to Schrade, Basha called him when he learned that the group of employees wanted to meet with him about "urgent safety concerns." Schrade advised Basha against meeting with the employees in a group and set out for Basha's office.[76] En route, Schrade claims to have observed two of several union agents stationed across the street from the warehouse talking on cell phones. When he arrived at Basha's reception area he saw two employees seated there also talking on cell phones. Schrade implied by these volunteered observations that union agents were directing the employees seeking to meet with Basha. Although he did not recognize any of the waiting employees, Schrade said that Operations Manager Felix later identified all of them to him.

After the group dispersed, Schrade arranged separate meetings with three of the employees. He explained his reason for doing so this way:

> Q. After the first attempt of the group of ten employees to meet with Mr. Basha, did you do anything as far as communicating with any of those employees?
>
> A. Yes, I did. *We needed to determine what, in fact, the urgent safety concerns were because we have an obligation, of course, to run our warehouse safe and efficiently*. So I determined who was still in the building on that very day and there were three—there were two people that I could visit with, Jose Rojas and Ramon Moroyoqui, and I went downstairs and spoke to Jose Rojas first and then, later, Ramon, Ramon Moroyoqui, and then the next day with Mike Silva from the refrigerated A. M. receiving crew. [Emphasis added.]

Presumably in response to Schrade's questions, Torres reported that he had two concerns. First, the production standard was too difficult and, second, the pallet jacks provided for him to work with ran too slow for him to meet the production standard. Schrade said nothing in response but Kelley did. He told Torres that the production standards had not changed in over a year and, even then, they were reduced in the area where Torres worked. In addition, Kelley told Torres that under the standard procedure in place, the pallet jacks were rotated among the employees so he would not have the same pallet jack all the time.

Schrade said the Union was never discussed at all in the August 22 meeting and Torres made no claim otherwise.

b. Analysis and conclusions

No evidence of any kind supports a conclusion that Schrade promulgated any rule concerning the solicitation of union cards. Therefore, I recommend dismissal of complaint paragraph 6(o)(3).

Assuming for purposes of analysis that Schrade told Torres that he knew Torres was a part of the group who sought to meet with Basha because he had observed him on a warehouse camera, I find this evidence insufficient to imply that he had gone out of his way to observe Torres' protected activities. Other testimony suggests widespread use of surveillance cameras throughout the warehouse facility. Because the small group of employees gathered

[76] Schrade's office is located in a separate building on the Distribution Center grounds.

and went to Basha office in full view of everyone else, and, undoubtedly, the camera system, I conclude that Schrade's remark carried no unusual implication even if made as Torres claimed. If they thought of it at all, Torres and the rest of the group probably realized that they would be visible on the house cameras to anyone who happened to look. Accordingly, I also recommend dismissal of complaint paragraph 6(o)(2).

However, I find the questioning of Torres' (as alleged in complaint para. 6(o)(1)) in the isolated setting of Kelley's office concerning the complaints he sought to present as a part of a group action constituted interference with employee concerted activities. It is my conclusion that this questioning was incidental to a larger plan to diffuse the employees' concerted activities. Schrade's justification that the Company's obligation to operate a safe and efficient workplace motivated his meeting with Torres amounts to nothing more than a convenient excuse devised to cover up what actually took place.

Only minutes earlier the company officials, suspecting that the group might be acting under direction from union agents, refused to meet with the employee group. For that reason I do not credit Schrade's claim of a legitimate business purpose for arranging to meet with Torres on August 22. Instead, based on what occurred, I find Schrade undertook to meet individually with a few of the employees involved and press them to explain the group's purpose in order to isolate individual members of the group from each other and their more articulate spokesman and strategist, Arturo Mendoza, in an effort to intimidate them and undermine their protected concerted activities. Although company officials had no duty to meet with the employee group at all, I find that this added offensive by Schrade, deliberately designed to emasculate the group effort, violated Section 8(a)(1).

3. Ramon de la Torre

a. Relevant facts

Ramon de la Torre, a baler employee with 10 years of Company seniority, became an early union supporter. He attended several union meetings and distributed union literature to his coworkers at the warehouse. During the Company's "2(11) training" sessions, a warehouse supervisor identified de la Torre to Schrade from a picture that appeared in a Hungry For Respect publication. In addition, De la Torre participated in the group effort to deliver the employee safety petition to Mike Basha in August and was one of the four Distribution Center workers who went to the Company's Phoenix headquarters to request the production of certain documents OSHA requires the Company to maintain.[77] Schrade acknowledged that the Company knew about de la Torre's prounion sympathies and activities.

The disputed discipline de la Torre received grew out of his use of the Company's standup forklift and its sophisticated battery charging equipment. The Company uses two types of battery-powered forklifts, standing and sitting. Two or three years ago, it installed and trained the standup forklift drivers on the use of a computerized battery maintenance system (BMS). [78]

[77] According to Ramon Moroyoqui, the four distribution center workers, Jose Rojas, Ramon De La Torre, a man named Hyma, and he, went on this expedition. Moroyoqui said they were accompanied by "[p]eople from the community . . . some people from the newspaper and some two or three representatives from the union." Tr. 971.

[78] Dry goods warehouse receiving Manager Kelley estimated that only 40 to 45 of the 190 or so employees under his supervision have completed the Company's 8-week course required for operation of the standup forklifts and the BMS equipment.

The computerized BMS equipment inventories the charging of batteries used by the standup forklifts at the Distribution Center.[79] After training on the use of the BMS equipment, the Company issues a special code to the employee for use in accessing the BMS computer. Employees with an assigned code can log on to the BMS computer and activate an attached scanner. The scanner reads the bar code on the battery from the forklift to be recharged and the replacement battery for installation on the forklift. Once scanned, the computer designates the recharging stall for the battery removed from the forklift. Thereafter, the computer designates the stall location of a fully recharged replacement battery.

In addition, the Company installed a G-force system on the standup forklifts to measure the size of an impact when the operator collides with something. It can also alert managers when the driver has a collision. These forklifts require two card-like keys to start and operate. Operators trained in the use of the stand-up lifts are issued the G-force keys. If the operator has an impact of sufficient force, the motor will shut down until a supervisor restarts the forklift with a special key. Both types of forklifts are used throughout the warehouse. No particular forklifts are assigned for use on the baler dock. Typically, when a baler employee requires the use of a forklift, the worker simply locates one that is available. However, as none of the baler employees received the training for the standup lifts, they have not been issued the G-force keys or codes for use on BMS.

In February 2007, de la Torre refused Kelley's offer for training on the operation of the standup forklift and the related computerized battery maintenance system (BMS) after he learned that the training would not result in a pay increase. Hence, de la Torre would have never been issued his own BMS code or been authorized to operate the standup forklift.

On October 9, Dennis Conner, a dry goods supervisor, reported to Dry Goods Manager Kelley that he observed de la Torre gain access to the BMS equipment by inputting another employee's code to activate the computer. Kelley decided to look into the matter because he thought de la Torre should not have been using the standup forklift or the battery maintenance equipment because he had never been trained on the proper use of those pieces of equipment.

The following day, October 10, Kelley arranged through Lizarrga to meet with de la Torre at the BMS equipment. En route, Kelley came upon mechanic Fernando Estrada who told Kelley that he had found a key chain in a burned out pallet jack motor. Kelley could tell that the key attached belonged to a baler lock. Kelley asked Estrada to accompany him.

When de la Torre met Kelley at the BMS, Kelley asked him to demonstrate how to operate the BMS. When it became apparent that he could not begin without the proper code, Estrada entered his own code and de la Torre continued with the requested demonstration. Kelley quickly intervened when he observed de la Torre improperly remove a battery. A short while later, Kelley discovered that de la Torre had a G-force key when he started the stand-up forklift to move it closer to the BMS in order to complete the battery switch. Kelley grabbed the key from de la Torre and questioned him about where he had obtained it. De la Torre explained that he had found it in the trash. De la Torre claims that he told Lizarraga about finding the G-force key and that Lizarraga encouraged him to keep it because de la Torre greatly preferred

[79] The standup forklift batteries cost from $4000 to $5000 each. The BMS equipment controls the recharge process to prevent workers from attempting to recharge a battery too soon or installing a battery that is not fully charged. By controlling proper charging of batteries, the system extends the life of the costly batteries considerably.

the standup forklift rather than a sitdown forklift for moving pallets, one of the major tasks on the baler dock.[80]

After the demonstration, Kelley went to Schrade's office to consult with him about disciplining de la Torre. The two decided on a day-and-a-half decision-making leave (suspension) for de la Torre's infractions.[81] Kelley returned to his office and instructed Lizarraga to bring de la Torre to the office. De la Torre, who was working nearby when Lizarraga spoke to Kelley on the baler dock phone, claims that the leadman told him after the phone conversation that he had to go to the office and stated, "You know, Mel Kelly, he is pissed off at you because you are hanging around with those guys from the union." (Tr. 835.) De la Torre acknowledged that Kelley himself never made any such remark to him. However, Lizarraga did not testify. Hence, I credit de la Torre's uncontradicted account about this remark.

Lizarraga accompanied de la Torre to Kelley's office and remained throughout the disciplinary conference that ensued, ostensibly as a witness. Kelley arranged for Denise Sierra to be present for the purpose of serving as an interpreter. At the meeting, Kelley presented de la Torre with a written conference memorandum with a decision-making leave of 1-1/2 days in length. General Counsel Exhibit 2.[82] Sierra translated all of the paperwork that accompanies this type of disciplinary action. The conference memorandum provides that the discipline is for "Not Meeting Bashas' Expectations /Safety." It cites three bases for the action: (1) using the battery maintenance equipment without prior authorization or training; (2) failing to promptly report the baler lock key as missing to management; and (3) unauthorized use of the standup forklift and failure to promptly turn over the G-force key to management. Kelley held de la Torre accountable for the missing baler lock key because it occurred while he served as the baler leadman.

Under the terms of a decision-making leave, the employee must return a completed "Statement of Accountability" form to management before returning to work at the end of the suspension period. The Statement of Accountability form contains a space for the employee to furnish a written statement accepting responsibility for the conduct that led to the decision-making leave, setting forth an "action plan" for resolving the deficiency, and recommitting themselves to the Company and to their job. General Counsel Exhibit 2: 3.

Because Kelley does not work Sundays, de la Torre's mandatory, post-DML conference was not held until Kelley returned to work on Monday, June 15. When de le Torre met with Kelley that day, he furnished Kelley with the DML form containing his statements handwritten in

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[80] Although not entirely clear, it appears that the second or standard starting card key for the standup lifts are readily available but the G-force cards are only issued to trained operators.

[81] Kelley cited his 2-day suspension of Michael Jovner in May 2007 as precedent for similar discipline he issued to de la Torre. I find that to be a big stretch. Although Jovner may not have been authorized to use a standup forklift, his disciplinary notice makes no mention of that fact. Instead, it discusses a serious, costly accident Jovner had and his "unsafe work practices." R Exh. 104. I have accorded very little weight to the Jovner discipline in reaching the conclusions I have made concerning de la Torre.

[82] Certain aspects of GC Exh. 2 apparently gave the General Counsel the impression that de la Torre's suspension lasted for 3 days as originally alleged in complaint par. 7(k). In fact, the suspension amounted to only 1-1/2 days. June 11 and 12 were de la Torre's regular days off. Hence, he served his DML suspension period on the last half of his June 10 shift and on June 13. De la Torre actually returned and worked his scheduled shift on Sunday, June 14. Rt: 876–877.

Spanish answering the form's questions. He also gave Kelley a statement typed in English that a union representative had prepared for de la Torre. The former contained contrite discourse the Company no doubt expected and ultimately accepted; the latter, a polar-opposite, used accusatory, confrontational, language defending the conduct that landed de la Torre's on the DML. There is general agreement that some of the statements in the typed document are simply inaccurate.[83] De la Torre claims that Kelley asked in reference to the typed document "who had filled out my papers, if it was the ones from the Union." De la Torre answered that a union attorney prepared that statement for him.[84] With that Kelley called Shrade and asked him to look at the typed statement. Kelley then told de la Torre to go back to work.

Kelley later met with Schrade to discuss the documents de la Torre returned to Kelley on October 15. They decided to meet with de la Torre and ask Juan Grano to join the meeting, primarily to do the interpreting. When the meeting began, Schrade explained to de la Torre that the DML process required that the employee acknowledge the deficiency that resulted in the leave and that the employee agree to a procedure for correcting the problem. Schrade told de la Torre that "anything less than that would not be acceptable and, indeed, would result in his termination from employment." (Tr. 1625–1626.) After reviewing the conflicts between the Spanish statement and the English statement, de la Torre agreed that former represented his response to the DML. Schrade prepared a Note to File memorializing that choice and the meeting ended that states:

> Today we discussed Ramon's DML responses. There was conflict between Ramon's response on Bashas' form 126 and the "Official Response" letter submitted by Ramon. Because the "Official Response" contained statements Ramon felt were inaccurate, he is withdrawing this document and allowing his response on form 126 to be his statement of accountability, which the company accepts.

(GC Exh. 3.)

b. Allegations, analysis, and conclusions

Complaint paragraphs 6(v)(1) & (2) alleges that Lizarraga's October 10 remark to de la Torre about the adverse effect of his union activities on Kelley violated Section 8(a)(1) because it amounted to a threat of an unspecified reprisal and because it created an impression of surveillance. General Counsel seeks to hold Respondent responsible for Lizarraga's remark because, as a baler leadman, he was Respondent's agent. Respondent denied Lizarraga's agency status.

Statements to an employee expressing management's anger about the employee's protected activities violate Section 8(a)(1), especially where they occur in close proximity to disciplinary action. *Frazier Industrial Co*., 328 NLRB 717, 724–725 (1999), enfd. 213 F.3d 750 (D.C. Cir. 2000). Such statements also serve often to disclose an unlawful motive underlying a disciplinary action. See, e.g., *Georgia Power Co.*, 341 NLRB 576, 583–584 (2004); *Wayne Erecting, Inc*., 333 NLRB 1212 (2002).

[83] The English language version asserted inaccurately that de la Torre had attended the standup forklift training, and charged that the statement in the DML about finding the G-force key in the trash was "ludicrous."

[84] Kelley's version varied only slightly. He said that he only asked de la Torre if he had prepared the typed statement and that de la Torre volunteered that a union attorney wrote it.

The defense here rests almost entirely on the Respondent's claim that Lizarraga is not its agent. The Board applies common law principles when examining whether an employee is an agent of the employer. The General Counsel's brief argues that Lizarraga satisfied the apparent authority test used to determine whether an individual is an agent of another.

Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. *Cooper Industries*, 328 NLRB 145 (1999). The test is whether, under all the circumstances, the employees would reasonably believe that the employee in question (alleged agent) was reflecting company policy and speaking and acting for management. *Great American Products*, 312 NLRB 962 (1993), and the cases cited there. The party asserting the agency relationship has the burden of proving its existence. *Pan-Oston Co.*, 336 NLRB 306, 306 (2001). Section 2(13) specifically states the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The question of when a principal becomes responsible for the acts of an agent is determined by the nature of the agency rather than authorization or ratification on the principal's part. *Bio-Medical of Puerto Rico*, 269 NLRB 827 (1984). The Board finds a principal responsible in the following circumstances:

> A principal is responsible for its agents' conduct if such action is done in furtherance of the principal's interest and is within the general scope of authority attributed to the agent, even if the principal did not authorize the particular act. In other words, it is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted.

Id. at 828, footnote omitted.

Here, no manager or supervisor maintained a regular presence in the baler area to oversee the work being performed at that location. Instead, Lizarraga regularly gave other baler employees their work assignments, reassigned employees from one task to another as needed, and provided routine direction for the workers on that dock. Kelley's direction to Lizarraga to bring de le Torre to the BMS machine for a meeting and, later, to the office for discipline reflect examples of day to day communication between management and the baler employees using Lizarraga as its conduit. Moreover, the context in which the statement in question was uttered implicitly suggests that Lizarraga was speaking for Kelley in particular. *Albertson's, Inc*., 344 NLRB 1172 (2005) ("the test for agency status is whether the alleged agent's position and duties, and the context in which the conduct occurs, establish that 'employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management'"). Thus, Lizarraga coupled Kelley's request to meet in his office with a statement that could be interpreted reasonably as an explanation for why de la Torre had to go to the office. I find this connection gave the statement a coercive edge. As I am satisfied that the General Counsel has established Lizarraga's status as an agent of Respondent, I conclude that the statement in question implicitly threatens a potential reprisal in the context found here. Therefore, I find Respondent violated Section 8(a)(1) as alleged in complaint paragraph 6(v)(1). *Teddi of California*, 338 NLRB 1032 (2003).

The further allegation in paragraph 6(v)(2) that Lizarraga's remark created an impression of surveillance lacks merit. In his brief, General Counsel argues that "Lizarraga put de la Torre on notice, and de la Torre reasonably could conclude, that the Respondent was monitoring his union or other protected activities." (GC Br. 56.) I find this assertion unsupportable in view of the fact that De la Torre openly engaged in numerous activities on behalf of the UFCW that

would permit management to know about at least some of his activities and his sympathies. Additionally, the statement references de la Torre's union activities only in a general sense and thereby fails to preclude any possibility that it referred to something other than his generally well-known activities. Therefore, I find that nothing in Lizarraga's remark alone would permit me to find as reasonable a conclusion that "Respondent was monitoring" his union activities. Accordingly, I find that General Counsel failed to prove Respondent violated the Act as alleged in complaint paragraph 6(v)(2).

Complaint paragraph 7(k) alleges that de la Torre's October 10 suspension violated Section 8(a)(1) and (3). General Counsel had the burden of persuasion under *Wright Line*, 251 NLRB 1083 (1980), to establish that the de la Torre's protected activities substantially motivated his October 10 suspension. The General Counsel succeeded in showing that de la Torre engaged in union activities, that the Company knew about his activities, and that the Company generally harbored animus toward the employee organizational activity of the kind engaged in by de la Torre. Occasionally, the Board has said that the General Counsel must also show an added element in order to meet his threshold *Wright Line* burden, i.e., a nexus between the employee's protected activity and the adverse employment action. See, e.g., *American Gardens Management*, 338 NLRB 644, 645 (2002). Regardless of whether the question of a nexus amounts to a formal fourth element in the General Counsel's case or not, I find the Lizarraga statement after taking Kelley's phone call requesting de la Torre be brought to the office suffices to meet this requirement and to shift the burden of persuasion to Respondent. Put another way, absent any evidence on Respondent's part, the General Counsel established enough to permit an inference that an unlawful motivation led to de la Torre's suspension.

As noted before, Respondent's burden under *Wright Line* is to persuade that the same action would have been taken even in the absence of his protected activity. I find Respondent met that burden as to de la Torre. The timing of this discipline supports Respondent's claim that it occurred for a lawful purpose. Kelley disciplined de la Torre shortly after learning through his personal visit with de la Torre on the warehouse floor that the employee regularly used the stand-up lift and its battery charger without proper authorization and training. Moreover, de la Torre knew without a doubt that he was not adhering to established rules about the use of this equipment. He had been told as much by Supervisor Grano a few days before the discipline. The fact that he only had a G-force key because he found one in the trash and the added fact that he had to borrow another employee's code in order to access the battery charging equipment reinforces the conclusion about de la Torre's awareness that his use of the standup lift was unauthorized. De la Torre's claims that the standup lift worked more efficiently in the pallet moving work and that Lizarraga told him to keep the G-force key he found are insufficient to overcome all the other indications that he knew he was not authorized to use that particular equipment.

Even though holding de la Torre accountable for the key chain found in the pallet jack motor might be viewed in a sense as piling on, it is not entirely out of line with the other issues addressed in the October 10 Conference Memorandum. Kelley's conclusion that he needed to get de la Torre's "full and undivided attention" as stated in the Conference Memorandum amounts, in my judgment, to a fair assessment of the situation before him. Respondent plainly had a right to insist on compliance with its rules relating to the use of its sophisticated and expensive equipment. Accordingly, I find that Respondent has met its burden of establishing persuasively that it would have taken the same action even in the absence of de la Torre's protected activity. Therefore, I recommend dismissal of this allegation.

Complaint paragraph 6(x) alleging an unlawful interrogation by Kelley on October 15 applies, according to the General Counsel, to the manager's question(s) as to who prepared the

typewritten DML statement that de la Torre proposed to submit following his suspension. I find no merit to this allegation. Rather, I find the inquiry justified in light of the Respondent's legitimate DML policies and processes that require employees to prepare their own written statement accepting responsibility and so forth for a misdeed. Given that de la Torre's limitations with the English language and the other deficiencies of the statement for DML purposes, I find Kelley's inquiries a reasonable pursuit of his managerial responsibilities. Therefore, I will recommend dismissal of this allegation.

Complaint paragraphs 6(y)(1), (2), and (3) allege that on October 23 Schrade independently violated Section 8(a)(1), and **complaint paragraph 7(l)** alleges that Schrade also violated Section 8(a)(3) by the Note to File he issued to de la Torre. More specifically, these allegations charge that Schrade threatened de la Torre with discharge and other unspecified reprisals because he engaged in union activity, refused to accept de la Torre's response to his DML for the same reason, and that the Note to File amounted to further discipline based on de la Torre's union activity. Respondent claims that Schrade's conference with de la Torre on October 23 and everything that took place there was for a legitimate business purpose. It also claims that the Note to File only memorialized the outcome of their conference and did not amount to a disciplinary action.

I agree with Respondent as to these allegations. As found above, General Counsel failed to prove that de la Torre's October 10 discipline was unlawful. For this reason, I find Respondent had a legitimate reason for the October 23 inquiry in order to determine whether de la Torre wanted to adopt the more repentant statement he prepared in his own hand or the unrepentant, accusatory typed statement that had been prepared by someone else and given to him to submit. Schrade's straightforward assertion that de la Torre stood to lose his job if he insisted that the Company accept the typed statement as his response to the DML is not an unlawful threat. Instead, it amounts to nothing different from what is implicitly set forth on every DML form in this case. The form specifically states the answers the employee provides to the three requirements of the DML amount to a "last resort process." In other words, the Company imposed those requirements on the employees to successfully conclude the disciplinary process. Therefore, Schrade could legitimately inquire into the ambiguity created when de la Torre submitted two conflicting statements in response to the DML. Although the Company's own rules establish that a Note to File is a part of its disciplinary process, the substance of the Note to File given to de la Torre merely recounts which of the two conflicting statements de la Torre chose to submit as his response to the DML. Accordingly, I find that General Counsel failed to meet the threshold standard required by *Wright Line* inasmuch as no showing has been made that an adverse action occurred at the October 23 conference. For these reasons, I recommend the dismissal of complaint allegations 6(y)(1)–(3), and 7(l).

4. Ramon Moroyoqui

a. Relevant facts

Ramon Moroyoqui, a warehouse utility specialist active on behalf of the Union's organizing campaign, approached Paul Samuel, an order picker, while both were at work around October 4. Moroyoqui handed Samuel a document entitled "Bashas Distribution Center Safety Survey." Samuel told Moroyoqui to leave it on his pallet jack, which Moroyoqui did and then left.[85] Samuel, an opponent of unionization, took the survey document to Kelley's office at

[85] Moroyoqui denied that he gave a copy of the survey to Samuelson in the manner described. I credit Samuelson. I have done so after considering the argument by counsel for

Continued

the end of his shift but purportedly provided Kelley with no detail about how he acquired the survey. After examining the survey, Kelley instructed a warehouse supervisor to tell employees that they did not have to complete the survey form because it was not an official company document. When that supervisor noticed that Moroyoqui came to the meeting called for this purpose with copies of the survey form in his see-through pouch, he reported what he observed to Kelley.[86] Moroyoqui acknowledged that he openly carried the survey forms around the warehouse in his pouch folded so that anyone could read it.

On October 11, Kelley arranged a meeting at his office with Moroyoqui to discuss the survey form. He brought Supervisor Vasquez in to serve as the interpreter because Kelley speaks almost no Spanish and Moroyoqui does not speak English very well. Moroyoqui asserted that Vasquez had difficulty interpreting during this meeting because he does not speak Spanish very well. Whether for this or some other reason the accounts provided by Kelley and Moroyoqui about this meeting vary significantly.

Moroyoqui said Kelley began by saying that he had been told that Moroyoqui was "distributing papers inside the warehouse" and asked why he had been doing so. He said Kelley then told him that he should not be distributing it "inside of the warehouse" because it was not a company survey. (Tr. 978–979.)

Kelley, on the other hand, said that he "had no clue" that Moroyoqui had been distributing the safety survey form when he first met with him about the subject on October 11. Instead, he said that he only knew that Moroyoqui had the survey form and that it was not an official Bashas' survey so he wanted to make sure Moroyoqui understood that. According to Kelley, he told Moroyoqui that he did not have to fill the form out because Bashas' did not sponsor it but, if he chose to complete it, he had to do so "in non-working areas during non-working time."[87] (Tr. 2759–2760)

Kelley said that he revisited the safety survey matter a second time about 2 weeks later. By then, Samuelson had provided Kelley with a written statement charging that Moroyoqui had given him a copy of the survey while the two worked in the same vicinity of the dry goods

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the General Counsel that Samuelson's anti-union bias colored his testimony about this issue. However, Moroyoqui admitted that he distributed the survey forms in a permissible location at the warehouse and further admitted continuous possession of at least one survey form while he worked around various areas of the dry goods warehouse. No evidence suggests another means by which Samuelson could have acquired a survey form, especially during the course of the workday as his testimony implies. No effort was made to establish that Moroyoqui never, or almost never, encountered Samuelson during the course of the workday. Therefore, I find this combination of factors makes Samuelson's claim plausible enough to warrant belief.

[86] The Company issues the see-through pouches to any employee who wants one for the purpose of carrying her/his personal effects on the Distribution Center floor. To reduce shrinkage, no other types of carriers are permitted on the floor. Moroyoqui kept his pouch on the pallet jack he used for his work.

[87] The General Counsel's brief suggests that, by doing so, Kelley had singled out Moroyoqui for unusual attention, particularly after the supervisor supposedly conducted a meeting to disown the survey bearing the Bashas' name. Although I do not dismiss that possibility entirely, some indicators suggest a more ambiguous situation. Thus, the evidence shows that only Moroyoqui openly kept a copy of the survey form around the warehouse. By doing so, he arguably gave Kelley a legitimate opening to directly address the Company's claims about the survey's bogus nature in case he had not received that message earlier from the supervisor.

warehouse. (R Exh. 100.) Kelley said that he called Moroyoqui in to inform him that he could only distribute the survey forms in the breakroom.

Moroyoqui provided a more expansive version of what occurred but ultimately acknowledged that his memory was poor and that he may have confused about what had been said in the two meetings. The General Counsel made no attempt to rehabilitate Moroyoqui following this admission. That aside, Moroyoqui said that supervisors Ramon Gonzales and David Vasquez as well as Denise Sierra, a shipping clerk in the dry goods department, also attended this meeting. Sierra provided the interpretation for Kelley and Moroyoqui at this meeting. Kelley told Moroyoqui that he wanted to discuss the survey further and then said that he had been told that Moroyoqui had been distributing them. Moroyoqui denied the accusation. Kelley pressed on by holding up the copy of the survey and noting that Moroyoqui had a copy of one on his pallet jack, and then saying that employees in the warehouse had been getting them. After some banter about the document Kelley displayed, Kelley supposedly said that paper was not from the Company and that he should not be distributing it "inside the Company on Company time," and that he did not want Moroyoqui "distributing that piece of paper." According to Moroyoqui, Sierra then began asking questions about the "paper" that Kelley displayed. She first asked Kelley what kind of "paper" they were talking about but he told her only that it was not from the Company and she did not have to know what the paper was about. Sierra then asked Moroyoqui what paper they were talking about and he told her that it "was a questionnaire that we were going about trying to gather so the people upstairs would listen to us and respond to safety concerns."

At the end of the meeting, Kelley asked Moroyoqui to sign a Note to File but he refused, initially because it was in English. The meeting ended but Kelley later called Moroyoqui back to his office after Sierra translated the Note to File into Spanish. Moroyoqui still refused to sign it claiming at this time that he could not read or write. Regardless, Kelley gave Moroyoqui a copy and sent him back to work. The Note to File states that it is "used to document" the discussion Kelley had with Moroyoqui and to reflect (through the signature never provided) that Moroyoqui understood Company policy. Future infractions, the Note to File states, "will result in disciplinary action." It then sets forth a basic no-solicitation, no-distribution rule seemingly applicable to a retail operation: Thus, the second paragraph of the Note to File reads as follows:

> Except for company-sponsored solicitations, no solicitation is permitted during working time and no solicitation is permitted on a selling floor during store hours. Should a member desire to engage in such activity, it must be confined to a non-working time, such as breaks and meal periods and in the non-selling areas of the store, during store hours. Except for company-sponsored donation program information, no distribution of literature, pamphlets, documents or any other materials is permitted during working time and no distribution of any sort is permitted in any working area, at any time.

(GC Exh. 4.)

Meanwhile, sometime between these two meetings, Moroyoqui experienced an incident in connection with his work that he perceived to be harassment that the General Counsel has included in the complaint. Moroyoqui's job duties as a utility specialist essentially involve cleaning up and attempting to salvage as much product as possible when accidents occur that result in a product spill. The Company provides Moroyoqui with a motorized pallet jack to use in connection with this work. At all times, several supervisors roam throughout the large warehouse space. A supervisor reports by radio any condition observed requiring a cleanup to a supervisor stationed in the office. That supervisor, in turn, calls out on the warehouse speaker system for a cleanup at the aisle where the spill is located. On a normal day, Moroyoqui

estimated that he will deal with five or six cleanup calls per hour and on a busy day he would have up to 10 calls per hour. Kelley instructed Moroyoqui that he should generally finish one clean up before moving on to another.

Moroyoqui's complaint concerns Supervisor Vasquez. On one particular day, Moroyoqui said that he received so many cleanup calls in such quick succession that he could not possibly keep up with them. Moroyoqui provided this account:

A. Well, I was going about doing my job, doing the things that I always did and he called me over aisle number 47.
Q. Who called you?
A. David Vasquez.
Q. When you said 47, do you mean that he told you to go to aisle 47?
A. Yes. Yes and I was going towards aisle 47 and I was not yet halfway towards aisle number 47 when he was calling at me, yelling at me to go to aisle number 21.
Q. And how was Mr. Vasquez communicating with you?
A. On the speaker.
Q. What did you do?
A. Well, I went over to pick up the things over in aisle number 47 and I still had not finished picking up the things from aisle number 47 when he was calling me and telling me to go to aisle number 35.
Q. What did you do?
A. Well, listened to him because he continued to talk.
Q. Well, what was he saying?
A. I was still picking up on 47 because it was flour and he yelled at me to go to aisle 15.
Q. And did you go to aisle 15?
A. I went. I picked up what I was doing on aisle 15—rather aisle 47 and then I went to number 21.
Q. What happened when you reached aisle 21?
A. Well, I had not yet gone to 21 and he was yelling at me, telling me to go to 21, to 25 and to 15 and then I got to 21 and I started gathering up the dog food and dog food is very dangerous.
Q. Did Mr. Vasquez keep going?
A. Yes.
Q. About how long did Mr. Vasquez continue to call you through the speaker?
A. I think it was like about once a minute or once every half-a-minute. He continued calling me, calling me, calling me, calling me on the speaker, yelling at me on the speaker.
Q. And for what period of time did he continue to do this?
A. Like an hour or two, talking.
Q. Did he go talk to you at any time?
A. No.
Q. Had Mr. Vasquez ever called you through the speaker that many times in that time span of about an hour?
A. No.
Q. What about any other Foreman or Supervisor?
A. No. They would always talk to me normally.
Q. Do you know what was going on with him?
A. No. I don't know what was going on but he was just screaming and screaming and I just don't know why.

Moroyoqui eventually got to all of the aisles Vasquez called out and found clean-up work to do at each location. No other employee appeared as a witness to corroborate Moroyoqui's account about Vasquez' conduct, or to provide a lay opinion as to whether the type of warehouse loudspeaker activity described by Moroyoqui was or was not unusual.[88] Likewise, no other utility specialist appeared as a witness to describe their experiences during a normal workday or to indicate whether any similar occurrence ever happened to them. Finally, no evidence shows that Moroyoqui ever complained to Kelley or any other manager about mistreatment of the kind Moroyoqui described.

Supervisor Vasquez, who serves as the office supervisor once or twice a week, denied that he ever called Moroyoqui in the manner described. At most, Vasquez, said, he will make 50 to 70 cleanup announcements over the intercom per shift for all of the utility specialists. A portion of these announcements are repeats. The announcement is usually repeated where there has been no response to a cleanup call for at least 10 minutes.

b. Allegations, analysis, and conclusions

Complaint paragraphs 6(w)(1), (2), and (3) allege that Mel Kelley engaged in coercive interrogation, created an impression of surveillance, and orally promulgated an overly-broad and discriminatory no-distribution rule on October 11 when he spoke to Moroyoqui about the safety survey. **Complaint paragraphs 6(z)(1)–(4)** allege Kelley engaged in coercive interrogation, surveillance, creation of the impression of surveillance, and the oral promulgation of an overly broad and discriminatory no-distribution rule in the course of the October 24 meeting. **Complaint paragraph 6(aa)** alleges that Sierra coercively interrogated Moroyoqui in the course of the October 24 meeting. **Complaint paragraphs 6(bb) and (cc)** combined allege that Kelley enforced the Company's no-solicitation, no-distribution rule on October 24 by prohibiting union solicitations at the same time that it permitted nonunion solicitations. **Complaint paragraph 6(ee)** alleges that around February 16, 2008, Respondent, by Kelley, permitted employees to post, solicit, and distribute antiunion petitions and flyers while barring employees from posting, soliciting, and distributing prounion petitions and flyers. **Complaint paragraph 7(i)** alleges that the October 24 Note to File constituted an unlawful written warning to Moroyoqui and **complaint paragraph 7(n)** alleges the rapid-fire assignments Vasquez issued to Moroyoqui were discriminatory. I find these allegations lack merit for the following reasons.

As previously noted, the Board applies a totality-of-the-circumstances test to determine whether questioning of an employee violates Section 8(a)(1). *Rossmore House,* supra. Ultimately, the Board "determine[s] whether under all the circumstances the questioning at issue would reasonably tend to coerce the [questioned] employee so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Medcare Associates, Inc.,* 330 NLRB 935, 940 (2000). The Board regularly looks to the following factors when evaluating interrogation issues: whether the employee has been an open and active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, the place and method of the interrogation, the truthfulness of the reply, whether a valid purpose for the interrogation was communicated to the employee, and whether the employee was given assurances against reprisals. *Millard Refrigerated Services,* 345 NLRB 1143, 1146 (2005).

As to the issues of unlawful surveillance, an employer's "mere observation" of its employees' open, public union activity on its premises does not violate the Act but conduct

[88] These loudspeaker calls can be heard throughout the warehouse.

going beyond that without justification does. *F. W. Woolworth*, 310 NLRB 1197 (1993). An employer's statement to an employee about protected activities violates the Act by creating an impression of surveillance if it would be reasonable for the employee to assume that the employer had placed their protected activities under surveillance. *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999); *Electro-Voice, Inc*., 320 NLRB 1094 (1996). The Board has found the same statement can amount to unlawful surveillance and create the impression of surveillance. *Seton Co.*, 332 NLRB 979, 981 (2000).

Applying these legal principles to the allegations in **complaint paragraphs 6(w)(1), (2), and (3)**, I find that Respondent violated the Act on October 11 when Kelley questioned Moroyoqui if he knew anything about the survey form, created the impression that Moroyoqui's union activities were under surveillance, and by the general prohibition against distributing the survey form in the warehouse. Kelley's ostensible justification for initiating this discussion with Moroyoqui is disingenuous. Respondent asserts that the Union, by its use of the Bashas' name in the caption of the survey, intentionally sought to mislead employees that the survey had official company sanction. In its brief, Respondent notes that Kelley called Moroyoqui in for the October 11 meeting after learning that he carried the survey around in his pouch and argues, in effect, that his purpose was to educate Moroyoqui about the "intentionally deceptive nature of the document." To support the legitimacy of Kelley's conduct, Respondent cites *Ogihara America Corp.*, 347 NLRB 110 (2006), and *DaimlerChrsyler Corp.*, 344 NLRB 1324, 1328 (2005). I find those cases inapposite to this situation because they involved employer inquiries into serious misconduct by the employees themselves.

Even assuming that the Union deliberately sought to mislead employees by using the Company's name in the title of the safety survey, the Union's misconduct cannot be imputed to Moroyoqui in the circumstances found here; and, in any event, that type of misconduct would not be serious enough to strip away the protection the Act provided for Moroyoqui's legitimate distribution of it. Kelley knew full well that Moroyoqui had long been engaged in the union-backed safety campaign. Hence, it would have been very unlikely that Moroyoqui would have been confused about the origins and sponsorship of the survey. For these reasons, I have concluded that Kelley purposefully sought to interfere with Moroyoqui's protected concerted activities by calling him to the office on the pretext of explaining that Company did not sanction the survey, and then advising him that he did not have to complete it and that he could not distribute it in the warehouse. This is especially true where, as here, Kelley made no claim that he knew or believed that Moroyoqui had been distributing the survey on worktime or in work areas and knew that Moroyoqui already had attended the supervisor's meeting during which it was explained that the Company had not authored the survey.

The allegations in **complaint paragraphs 6(z)(1)–(4) and 7(i)** pertaining to the October 24 meeting Kelley conducted with Moroyoqui lack merit. Just prior to this meeting, Kelley received Samuel's report that Moroyoqui gave him a copy of the survey during worktime on the warehouse floor.[89] This report coupled with knowledge that Moroyoqui openly carried the survey forms around on the warehouse floor gave Kelley a legitimate business reason for conducting the October 24 meeting. The only question asked by Kelley ("[W]ell, then how was it that [employees] were going about handing out, distributing papers[?]") after Moroyoqui denied distributing the survey during worktime was, as Respondent contends, rhetorical in character and not unlawful. And contrary to the General Counsel's claim, I find that the October 24 Note to File constituted a lawful warning. Based on Moroyoqui's open possession of the survey form or forms around the time involved and Samuel's report, Kelley had a good-faith basis for

[89] I credit Samuel's story that Moroyoqui gave him the survey while both were at work.

believing that Moroyoqui distributed the survey during worktime. Additionally, I do not credit Moroyoqui's assertion that Kelley said he could not distribute the survey on "Company time" primarily because it is contrary to the no-distribution rule set out in the Note to File Kelley eventually provided to Moroyoqui after getting it translated into Spanish. Instead, I find it improbable that Kelley would have deviated from the language of the previously prepared Note to File. Moreover, Moroyoqui eventually admitted that his recollection was so therefore I find that Respondent did not violate the Act when Kelley called attention to the Company's no-distribution rule and warned Moroyoqui that he risked discipline if he violated the rule in the future. For these reasons, I recommend dismissal of complaint paragraphs 6(z)(1)–(4) and 7(i).

As to **complaint paragraph 6(aa)**, I find the General Counsel failed to prove that Sierra unlawfully interrogated Moroyoqui at the October 24 meeting for two reasons. First, the evidence is insufficient to show that Sierra was an agent of Respondent for any purpose other than serving as an interpreter on that occasion. I find that nothing about her role at the October 24 meeting would reasonably lead one to conclude that her presence was for any purpose other than translating what Kelley and Moroyoqui said to each other. Second, the circumstances (particularly the fact that she initially asked Kelley about the document—the survey form—that he held up while talking before she asked the same thing of Moroyoqui) satisfies me that she merely sought to satisfy her own personal curiosity rather than to interfere with Moroyoqui's Section 7 rights in any manner. I will therefore recommend dismissal of this allegation.

I find General Counsel also failed to prove that Respondent, as alleged in **complaint paragraphs 6(bb), (cc), and (ee)**, discriminatorily enforced its distribution and solicitation rules. Complaint paragraph 6(cc) alleges that on October 24 Kelley "selectively and disparately" enforced Respondent's established rules (as set out in complaint par. 6(bb)) by prohibiting prounion, and permitting antiunion, solicitations and distributions. Complaint paragraph 6(ee) alleges that since February 16, 2008, Kelley has "allowed employees to post, solicit, and distribute anti-union petitions and flyers while refusing to allow employees to post, solicit, and distribute pro-union flyers." Succinctly put, the General Counsel claims that Respondent did not enforce its policy on solicitation and distribution against employees who engaged in antiunion activity but that it did enforce that policy against employees who engaged in prounion activity. In support, the General Counsel cites the Note to File given Moroyoqui on October 24 and contrasts that with the February antiunion activities of Manuel Garibay (the petition posted in the breakroom) and Oscar Padilla's (signs attached to his modes of transportation). (GC Br. 81–84.) I find the General Counsel's odd construct lacks factual support as to some parts and legal support as to others.

Moroyoqui's conduct related to distribution has been set forth previously. I have concluded that Respondent had ample reason, based on Samuelson's report, for issuing a Note to File warning that it would take disciplinary action if Moroyoqui continued to distribute the safety survey on the warehouse floor during worktime. By contrast, the General Counsel failed to adduce any evidence that Garibay engaged in any conduct prohibited by Respondent's solicitation or distribution rule Kelley applied to Moroyoqui's conduct. The evidence actually shows only that Garibay posted his petition on the breakroom bulletin board and nothing more. It is undisputed that the Company does not restrict use of the breakroom bulletin board to company proclamations; the Company permits employees to post personal advertisements, such as those for homes, cars, and food. The facts are similar about the antiunion flyers that appeared on the breakroom table with the catered food.[90] As with Garibay's petition, no

[90] For purposes of this decision, I have assumed that the Company put that flyer out.

evidence shows that anyone distributed the flyer on the warehouse floor during worktime in violation of the Company's rule.

Furthermore, I find the Company's solicitation/distribution policy alleged at complaint paragraph 6(bb) essentially inapplicable to Padilla's "No Union" displays.[91] Instead, I find they are comparable to the prounion T-shirts some of the other employees wore while working in and about the Distribution Center. As to both displays, the principles articulated in *Republic Aviation v NLRB*, 324 U.S. 793 (1945), and *Kendal Co.*, 267 NLRB 963 (1983) apply. A rule barring an employee from wearing an insignia protected by Section 7 at work is presumptively invalid unless special circumstances exist which make the rule necessary to maintain production or discipline, or to ensure safety. Id. at 965. No party established that Respondent maintains a rule applicable at the Distribution Center that precludes employees from wearing "message clothing" or protected displays on their personal gear. No evidence shows that Respondent attempted to prevent employees from wearing the prounion T-shirts. Even though it apparently maintained no rule regarding insignias, Respondent's limited, ad hoc prohibition against attaching protected personal messages to its equipment used in and about the workplace by Padilla does not violate the Act. Because I find *Republic Aviation* principles govern Padilla's conduct, General Counsel's reliance on this evidence to show discriminatory enforcement of the Company's distribution and solicitation rules is misplaced. But even if that were not true, I find Respondent's enforcement actions against Moroyoqui and Padilla were essentially evenhanded. Therefore, I recommend the dismissal of the unfair labor practice allegations made in complaint paragraphs 6(bb), (cc), and (ee).

Finally, I recommend dismissal of **complaint paragraph 7(n)** because I find Moroyoqui's testimony about rapid-fire cleanup calls exaggerated and unreliable. Moreover, his admission that all of the assignments involved legitimate salvage work that he normally performs strongly supports Vasquez's credible claim that he only relayed valid assignments as they happened.

5. The Hansen-Mendoza exchange

a. Relevant facts

Human Resources Manager Schrade met with four warehouse managers in September to talk about the Union, specifically the UFCW's ongoing corporate campaign targeting Bashas in the community. Schrade "suggested that the managers go out on the floor and talk to a couple of individuals and give [their] opinion" about how they felt about the UFCW's anti-Bashas' campaign. The following day John Hansen, the receiving manager of the refrigerated warehouse, interrupted Mendoza at work on the shipping dock to speak with him about the Union. Hansen claimed that he already knew about Mendoza's prounion sympathies and had known of these leanings since Mendoza transferred to the refrigerated warehouse 4 years earlier. Mendoza said they were alone at the time Hansen approached; Hansen said that three or four other employees were in the vicinity but he could not recall who they were. Hansen began, according to Mendoza, by asking if he was involved with the union activities and Mendoza admitted that he was. Hansen then asked what the employees were mad about since they received good pay and benefits. In response, Mendoza said the pay was good but the benefits were not. He went on to recount his displeasure because the Company started charging $80 a month for his health insurance plan. Hansen told Mendoza that sometimes companies had to do things like that to compete and that Bashas' would not budge even if the

[91] No evidence shows that Respondent induced or encouraged Padilla's specific displays.

union got in. Hansen also told Mendoza that he "used to work for a union company and the Union is no good."[92] (Tr. 502.) The conversation ended with that.

b. Allegation, analysis, and conclusions

Complaint paragraphs 6(u)(1), (2), and (3) allege that Hansen, by the foregoing conduct, violated the Act by coercively interrogating Mendoza, created an impression his union activities were under surveillance, and solicited employee complaints and grievances from Mendoza in a manner that impliedly promised increased benefits and improved terms and conditions of employment for refraining from union activity.

I find merit to coercive interrogation (par. (6(u)(1)) and the surveillance allegations (par. (6(u)(2)). This exchange did not occur in the course of everyday chit-chat on the warehouse floor; it resulted from the instruction to managers by the Distribution Center human resources manager to confront employees and voice disapproval of the union's conduct. As such, it has no innocent qualities; it amounts to a deliberate, contrived attempt by Respondent to interfere with protected employee activities. Hansen's assertions that the union was no good, and his unsupported prediction that the Company would not "budge" on economic issues if the Union succeeded, amount to bare-knuckle statements made in compliance with the instruction given him the day before by Schrade. However, those statements also disprove the General Counsel's third allegation that Hansen implicitly promised increased benefits and improved working conditions if Mendoza refrained from union activity. Accordingly, I recommend dismissal of **complaint paragraph 6(u)(3)**.

6. The McKinnon threat

Complaint paragraphs 6(dd), (1), (2), and (3) allege that Kelley made statements to employees that unlawfully threatened discharge (pars. 6(dd)(1)) and unspecified reprisals (pars. 6(dd)(2)), and that amounted to a threat couched in the form of an invitation for employees to resign (pars 6(dd)(3)).

a. Relevant facts

Vernell McKinnon, a baler employee, had worked at the Distribution Center for about 4 months when the incident involved here occurred.[93] He initially had been employed as a temporary order selector in the dry goods warehouse. His performance in that capacity did not go well as he quickly accumulated enough errors to be on the verge of discharge under the Company's probationary system for order selectors. In order to prevent his looming discharge, Warehouse Manager Kelley intervened and hired McKinnon as a baler employee. By doing so, Kelley prevented McKinnon's almost certain termination of his company employment.

[92] Although Hansen dated this exchange with more certainty than Mendoza, I find Mendoza's account about the setting and substance of it more reliable. Mendoza's version squarely targets the new health insurance cost as his source of dissatisfaction. That squares with other evidence showing widespread employee dissatisfaction resulting from that change. Moreover, Hansen merely provided an alternate version of their exchange; he did not specifically deny the statements attributed to him by Mendoza. Finally, Hansen's inability to recall the names of any employees he claimed were present makes me suspicious that this aspect of his account amounts to gloss added in an effort to sanitize his coercive conduct.

[93] The transcript is corrected to reflect the proper spelling of McKinnon's given name.

Early on McKinnon became a union supporter. On November 1, he wore a union T-shirt to work for the first time. As it happened, Kelley conducted an instructional meeting in the baler department that very day concerning the Company's attendance policy. Both Kelley and McKinnon agree that following the meeting, Kelley invited McKinnon for a ride on his golf cart. According to McKinnon, Kelley soon referenced McKinnon's union T-shirt and remarked that it "kind of slapped him in the head." Kelley asked if he felt left out and McKinnon said that he did. By way of explanation, McKinnon complained that he had not yet received his insurance coverage notice. Although Kelley promised to look into the matter for him, he added that if had known he planned to do this to him, i.e., take up with the Union, he would have just let him get 12 points as an order picker and be fired.[94]

b. Analysis and Conclusions

I find merit in **complaint paragraph 6(dd)(1)**. The account of Kelley's statement that I credit implicitly threatens that McKinnon's union sympathies might lead to his discharge. General Counsel failed to provide a clear explanation of the purpose for the two additional allegations. Without that, I can conclude that **complaint paragraphs 6(dd)(2) and (3)** amount to little more than redundant pleading, unrelated to the facts adduced. I, therefore, recommend dismissal of these two additional allegations.

7. Baler operations subcontracted to TBG Logistics

Complaint paragraph 7(p) (along with the broad conclusionary par. 7(q)) alleges that Respondent terminated the baler employees on January 26 and subcontracted its baler operations at the Distribution Center to TBG Logistics in order to discourage its employee's union activities. The complaint specifically requests that Respondent restore its baler operations and make employees whole for losses suffered as a result of this conduct. Complaint at p. 22.

a. Relevant facts[95]

In February, Michael Basha, Donny Felix, and Steve Schrade met to discuss the annual compensation adjustments for the Distribution Center employees. Schrade said he told the two other executives that he believed the Company would need to increase the pay of its non-core

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[94] Kelley said that McKinnon mentioned that he felt unappreciated and that lead to the invitation to join him on the golf cart so they could talk out of the presence of others. Later McKinnon mentioned the insurance notice and Kelley promised to look into it even though McKinnon was 2 months short of eligibility. Kelley said that he then told McKinnon that he felt unappreciated too because McKinnon seemed dissatisfied with the baler job that Kelley had arranged for him. Although the accounts by the two men have a degree of agreement, I credit McKinnon. Based on Kelley's recent conduct toward Moroyoqui's activity—some I have found lawful and some not—I conclude that McKinnon's T-shirt most likely struck a chord in Kelley because of his instrumental role in saving McKinnon's job and, therefore, that tone and substance of the conversation more likely than not occurred as described by McKinnon.

[95] This account is derived from the testimony provided by Michael Basha, Steven Schrade, and Matthew Connors, and relevant documentary evidence about the bidding process that preceding Respondent's subcontracting of its Distribution Center baler work. Connors owns TBG Logistics, Inc., the subcontractor now performing Bashas' baler operations at the Distribution Center. No other Basha official nor any representative of the other third parties who bid on the baler work testified about the negotiation process.

classifications (balers, utility employees, Ocotillo reclamation workers, vending employees, and the tire and fuel employees) by about 20 percent in order to remain competitive.[96] Alternatively, Schrade said that they may want to consider outsourcing some of these functions.[97] Basha thought they would not be able to take such a major step (outsourcing) during the current compensation process so he instructed Schrade to "gather some more information on wages and outsourcing so they could take that issue up in 2008 cycle. (Tr. 2529.)

Following the February meeting, Schrade talked with officials at World Super Services (WSS) about taking over some of the non-core operations mentioned above.[98] However, his first face-to-face meeting with any of those officials did not occur until June 20 when he met with Mark Gage, sales director for WSS, to discuss the outsourcing of Respondent's entire reclamation operations, namely the baler operation at Chandler and all of the operations at Ocotillo. Schrade and Gage agreed that a team of WSS managers would inspect the Chandler baler operations on July 13.

On July 17, Schrade conducted the 2(11) training with the warehouse managers and supervisors. At that meeting a few of the supervisors identified eight employees for Schrade whose pictures appeared in the *Hungry for Respect* publications he brought to the training sessions. Four of the eight were baler employees.

The next day Schrade e-mailed Gage and Joe Allen, another WSS official, to provide some basic information about the scale and scope of the baler operation. At the beginning of that e-mail, Schrade stated:

> Things are moving swiftly.
> We have union issues with members on the baler dock.
> I have asked Michael to consider outsourcing this operation.
> We will be discussing this tomorrow.

(GC Exh. 30: 2.) In his response about 2 hours later, Gage posed a number of additional operational questions that would likely come up in a multiparty telephone conference about to take place and, noting that Schrade had stated he would be talking to Basha about the outsourcing "tomorrow," asked when Basha expected a proposal from WSS.

On July 20, Schrade initiated an e-mail exchange with Basha. Schrade began by setting out in detail his proposed wage and classification adjustments for the non-core classifications. He started by saying: "I want to bring you up-to-date on our project to review wage rates and determine what options we have" and concluded his message with: "Of course, another option

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[96] At the time, the Company employed about 30 balers, 30 utility employees, 40 Ocotillo employees, 8 vending employees, and 3 fuel and tire employees.

[97] Schrade came to Bashas from the Fleming Companies, a large food wholesaler. At Fleming, Schrade had been involved in outsourcing a number of functions. He also had some involvement with the outsourcing the unloading/lumping function to WSS in 2005. Sonny Felix, Bashas' logistics vice president at the time, handled those negotiations and the implementation WSS contract. According to Schrade, Sonny Felix refused to consider any further outsourcing suggestions from him because Felix did not want to displace anymore of Bashas' employees.

[98] By this time, WSS had been engaged by Bashas for just short of 2 years as a subcontractor performing the unloading and lumping operations at the Distribution Center. In later proposals to Bashas, WSS claimed that its performance under the unloading/lumping had been highly successful. No one from Bashas disputed that self-assessment.

is to consider moving some, if not all, of these functions to a third party. Many DCs in our industry have done just this so that they can focus on the core process of food distribution." In between, Schrade set his proposals for wage rate increases and classification adjustments that took up half a page. Schrade's e-mail makes no reference to his ongoing discussions with the WSS officials. (R Exh. 89: 1–2.)

In response to Schrade's mention of "moving some, if not all, of these functions to a third party," Basha stated "I am not opposed to third party and we have had discussion in the past with WSS taking over some of the departments. Besides WSS can do some research on some other third party providers that offer similar services." Id. at 1

By mid-August, Schrade and Supervisor Grano began conducting a series of captive audience meetings with small groups of employees to address the union organizing drive. Schrade called the meetings "Bashas Together" meetings. As partially described earlier, the content of these meetings followed this general outline: (1) Company founder Eddie Basha expressing his opposition to unionization via a video-taped message; (2) Schrade calculating the cost of potential dues the union could charge employees; (3), employees invited to share any prior, bad experiences with unions, and (4) the distribution of a two-page flyer containing excerpts of magazine and newspaper stories (GC Exh. 64) in which some employees who endured the 2004 southern California supermarket strike were "bitter" and charged that the UFCW "sold us out." Schrade conducted 30 such meetings in order to reach the entire work force at the Distribution Center with the Company's message.

Meanwhile, four managers from WSS met with Basha, Felix, and Schrade on August 22 to present their proposal for taking over the Company's reclamation operations at Chandler and Ocotillo. Basha ultimately found several aspects of the proposal unacceptable and rejected it. Among other problems, the $600,000 annual cost savings WSS envisioned in its proposal would be dependent on several capital improvements to the Ocotillo facility that Basha and Felix estimated would cost well over $200,000. As for the Chandler baler operation, WSS managers argued that significant cost savings would result from maintaining full-time supervision in the baler area. In support, WSS cited its success at increasing the trailer processing time to 1.25 trailers per man-hour at a Kroger distribution center in Indiana to closer supervision of the baler work. At the time, WSS estimated from their review of the operation and the materials Bashas provided to them that the balers at Chandler processed approximately .55 trailers per man-hour. Despite this, Basha said that he requested WSS prepare a new proposal excluding the Ocotillo operations because he did not want to make the capital outlays requested by WSS.

After this meeting, Basha, Felix, and Schrade discussed the possibility of achieving some of the savings envisioned by the WSS proposal through the Company's own internal changes, e.g., placing a full-time supervisor in the baler area on each of the two shifts worked there. Basha said he rejected even this step because "[w]e decided that that [hiring two supervisors] would be driving up costs, but I explained we need to be reducing costs." (Tr. 2541–2542.) Near the end of this meeting, Basha told Felix and Schrade that he would subcontract the baler operation to WSS if they came up with a proposal that would produce "a six figure savings." Within the next week or so, Jesse Campos, a Basha accountant, made an analysis of the WSS proposal that, among other things, determined that Basha's weekly labor cost for the baler operation was slightly over $19,000.

Although Michael Basha said that discussions and information exchanges continued over the next several weeks, WSS did not submit a second proposal until November 16, nearly 3 months after the first. The key economic provision in the second WSS proposal provided: "Charges will be capped at 950 hours/$19,000 per week, provided inbound loads do not exceed

500 loads per week. Inbound Loads over 500 per week will be billed at $38.00 per load." The proposal also states that WSS would seek to achieve a goal of processing one trailer per worker hour from the current 0.5 and that even with increasing the processing level to only 0.75, the proposal would save Bashas $200,000 annually.

Basha said he rejected the new WSS proposal because the balers regularly processed over 700 trailers per week. In addition, the proposed weekly charge roughly equaled the existing labor cost as shown by the Campos analysis 2-1/2 months earlier. And finally, WSS would not guarantee its estimated $200,000 annual productivity savings. (R Exh. 91: 6.)

WSS presented three additional proposals in quick succession, all three of which Basha rejected in short order. The November 19 proposal and those that followed all retained the 950 hours/$19,000 weekly charge cap. However, the November 19 proposal increased the weekly load limit to 620 before the applying the $38 charge per trailer. That proposal retained the processing goal of one trailer per worker hour and estimated Bashas would save $100,000 annually even with processing level only went to 0.75. (R Exh. 92: 5.) The November 23 proposal increased the load limit to 724 before the $38 charge applied; the November 27 proposal increased the load limit to 750 with a provision to "revisit their proposal if the weekly load totals deviate significantly from that assumption."[99] Both of WSS's proposals continued to estimate a $100,000 annual savings. (R Exh. 93: 5; R Exh. 94: 5). Basha rejected the fifth WSS proposal supposedly because the $19,000 weekly charge was too high. He also told WSS that he intended to open to bidding to other third parties. WSS submitted no further bids.

Schrade claimed that he had no involvement in seeking bids from other outside third parties following the failed negotiations with WSS. He explained:

> Q. You testified earlier that you were not involved in meetings or obtaining bids from any other parties other than WSS. Correct?
> A. Correct.
> Q. Did Mike Bashas tell you why you were not involved?
> A. No.
> Q. Do you have any reason or understanding as to why you were not involved in that process?
> A. Michael knew that I had personal relationships with these folks and that I had a—I had also an interest in them taking this contract because of the other efficiencies I was looking at, i.e. order selecting pools, and I think he felt that I was a little to close to that to be objective with another vendor.
> Q. You just mentioned other efficiencies, i.e. order selection pools. Can you explain what you mean by that?
> A. What I'm referring to is that the grand plan was that, if WSS were to take this contract and have the baler operation, that they'd be well placed then to also provide manpower for the order selecting pool.
> Q. You said the grand scheme. Whose grand scheme?
> A. Mine.
> Q. And why would that have placed them well to provide order selectors?

[99] WSS's November 23 and 27 proposals also reflect new assumptions based on production information provided for the period from September 23 through October 27 showing that Bashas' employees processed 724 loads per week with a load processing rate of 0.65 per worker hour. As noted, earlier assumptions in the proposals reflect load processing rates of 0.5 and 0.55 that WSS determined for itself.

A. Because there would have been at any given time 50, 75 WSS personnel in the building, of which, depending upon business day, if I had a need for 10 order selectors, in theory, I could go to them and say I need 10 people and they could shuffle some of those people amongst their operations to the order selecting pool or to the receiving dock or over to the baler.
Q. Had you ever explained that that was your grand plan to Mike Bashas?
A. Yes.
Q. What was his response?
A. He liked it.
Q. Did he tell you why he wasn't going to go along with it ultimately?
A. That WSS wasn't cost effective in his mind. The grand plan would have been too expensive.

Thereafter, Felix provided Basha with the contact information for three other companies, all of whom had bid on the unloading/lumping operation in early 2005. LMS, one of the three, expressed an interest in doing both the unloading/lumping and the baler work but declined to submit a bid after Basha refused to consider combining the two contracts.

Basha claims that he contacted Direct Offloading Solutions (DOS), another of the three, and one of its officials came to the Distribution Center to meet with him and observe the baler operation. Thereafter, DOS submitted a four-page bid proposal with a cover letter dated December 21 addressed to Cash Eagan, the dry goods receiving manager. Using a bulleted list the cover letter emphasizes the following sales points:

- A dedicated floor manager responsible for results.
- Employees are treated as internal customers, serviced with respect and dignity.
- Keeping turnover low as a result of excellent wages and pleasant work environment.
- Hiring the “right” individuals by using extensive screening techniques, background checks, and drug testing.

Basha said he rejected the DOS proposal because of the overtime and holiday pay rates that company intended to charge.

Basha said when he called the number Felix provided for The Batie Group he spoke with Matthew Connors. Connors had worked for WSS from 2003 until the end of October 2005 when he left to become the operations director at The Batie Group, a company newly formed by Luther Batie, himself a former WSS manager who left to form his own enterprise. While he still worked at WSS, Connors’ management responsibilities lead him to visit the Distribution Center and observe the unloading/lumping work in progress.[100]

Connors recalled that Michael Basha telephoned sometime in late October or early November and left a message on his answering machine. When he returned the call, Basha told him that he was taking bids on the baler work and asked him “to put a proposal together and contact him when [he] had that done.” Connors said only that Basha knew that he had successfully bid a baler operation in the past. (Tr. 473.) However, Basha was more elaborate in describing Connors qualifications. He testified:

[100] Schrade claimed that Connors met with Michael Basha and himself in January 2007 as a TBG representative seeking to take over the offloading/lumping operation then being performed by WSS. Schrade implied the performance of this work by WSS had been subpar.

> Well, first, Matt had the logistics background. I learned from talking to him that he was the area manager for WSS, who's responsible for getting the efficiencies at 1.25 trailers an hour at the Indianapolis facility that WSS was touting. Matt was the one—
>
> * * *
>
> Matt oversaw the whole takeover of that dock when he was an area manager for WSS at the Indianapolis facility.

(Tr. 2565)

Connors said he visited the warehouse, observed the baler operations, and subsequently submitted his proposal. Unlike the lengthier proposals of his competitors (including his former employer WSS) Connors submitted a half-page, barebones proposal dated December 19 in the name of TBG Logistics (TBG), the entity he later established formally.

The key components of TBG's proposal included a commitment to provide 25 full-time employees to cover four shifts per week (two each on Monday through Friday and two each on Saturday and Sunday) that TBG would bill at $15.75 per hour (an amount within pennies of Bashas' average hourly cost—hourly wage rate plus cost of benefits—per employee) invoiced weekly. (R Exhs. 96 and 98.)[101] Under its proposal, TBG accepted responsibility for any overtime expense, "safety and certification requirements" to operate equipment, and the "I-9 verifications for all hires, both new employees and current bailing [sic] staff employees that may join TBG logistics." None of the bids submitted by other contractors addressed form I-9 verification. Connors initial bid contained no labor cost cap.

On Monday, December 24, Connors e-mailed Basha agreeing to a weekly labor cost cap of $16,120 per week and to a requirement for the review of the baler staffing with Basha's management every 2 months "to ensure staff reduction goals are being met." (R Exh. 97.) In the e-mail Connors stated that he deemed these added commitments important after "talking with Cash on Friday." This e-mail also mentions that he and his "leadership team" would be present on the docks as a part of the "26 employee staff."[102] Basha said he notified Connors that he would accept the bid after receiving this e-mail agreeing to unconditionally cap the weekly labor charge. However, at Connors' request a few days later, Basha agreed to increase the cap to $16,380. Basha conducted a meeting with Connors and other Distribution Center managers on December 27 to inform the Bashas managers of his decision to subcontract the baler operation to TBG and to discuss the transition details. The Bashas' managers in attendance were Felix, Schrade, and Eagan.

Connors established TBG as a limited liability company on January 8, 2008. (GC Exh. 17.) He capitalized it with $100 and is the sole owner and officer. TBG's business address designated in its formal documents is Connors' residence, the location from which he continued to operate the business at the time of the hearing. The name of the business is the acronym for The Batie Group Connors used on his business cards when he worked for that enterprise. Connors said that Luther Batie "had returned to Texas" by the time he established TBG which,

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[101] Based on the information reflected in R Exh. 98, I calculate Bashas average hourly cost of labor in the baler department to be $15.65 per hour.

[102] Connors' proposal contemplated 25 employees. After he took over the baler operation, Connors said that he often spent up to 80 hours a week at the baler dock himself.

along with Connors' own availability, merits the inference that The Batie Group no longer remained a viable business entity in Arizona by December 2007.

On January 17, Basha and Connors signed a 1-year service agreement, effective January 27, incorporating the terms of their understanding. (GC Exh. 19.) The agreement contains a general termination provision providing that either party may terminate the agreement with a 60-day advance, written notice. After the first week of operation, TBG's labor charge invoices to Bashas have all been for amounts less than the agreed-upon maximum. (R Exh. 99.)

Michael Basha put Schrade in charge of planning and handling the details of the transition. Schrade's goal planning sheet prepared on January 16 (GC Exh. 13) contains the following entries listed as benefits to be achieved from the outsourcing the baler operation:

> Reduce expenses by 100K +
> Increase ROI, efficiency
> Remove associated employee issues
> Educate DC members.

Schrade listed unfair labor practice charges at the top of the list of obstacles that could be anticipated followed by fear of "o/s (outsourcing) in utility" and in "o/s," a reference to the order selector employees.

Schrade claimed that the "associated employee issues" referred to his concern with I-9 immigration issues. Specifically, he said: "Outsourcing would remove them because they would no longer be employees and there'd be no liability under the Immigration and Naturalization Act of 1986" (IRCA). He implied that he had hesitated to deal with that aspect of the baler operation because he thought that would be discriminatory "unless there was a specific reason." (Tr. 1557–1558.)

On January 22, Schrade along with Kelley, Grano and Connors met with the balers to announce Respondent's decision to outsource the baler operation.[103] In preparation for this meeting, Schrade prepared a list of "talking points" to use in making his presentation. (Tr. 1554–1555; GC Exh. 53.) There are seven points Schrade listed under a heading, "Why is Bashas' Outsourcing the Baler Operations?" The first three refer to the competitiveness of the industry generally, the local market conditions, and the need to continuously examine "processes, technology and equipment" that can improve efficiency and reduce costs. The fourth talking point alludes to an industry practice of outsourcing "non-core distribution center functions" and refers to the unloading/lumping operation as an example. The fifth talking point refers to the outsourcing of "the handling of returns, such as occurs on our baling dock" by two competitors in the local market. The sixth and seventh talking points announce that the Company has spent a year discussing the outsourcing of the baler dock functions with various third party vendors and decided eventually to contract out the baler operation to TBG "in the best interest" of the Company and the employees. One of the remaining talking points under the heading, "What happens next?," provides that "All Bashas' members currently performing functions that TBG will perform will be offered an opportunity to continue performing this work as a TBG employee."

[103] A few employees said Felix spoke to the employees. Schrade made no mention of this. These employees tended to have less tenure and appeared to be confusing Schrade with Felix.

Schrade informed those present that the baler operation under Bashas would end on January 26 and that TBG would take over on January 27. He told the balers that he had applications available for anyone who wanted to apply for the four open positions with Bashas at the Distribution Center. He also mentioned that several openings existed at the retail stores. Schrade told the balers that TBG would be interviewing employees at a nearby hotel and introduced Connors to discuss that.

By January 27 Connors hired 18 of Bashas' 29 balers for his original employee compliment. The remaining seven employees he hired to begin operations came from other sources. Bashas transferred eight of the baler employees to other distribution center jobs. Three balers, Walter Henyard, Vernell McKinnon, and A. C. Span failed to obtain employment with either Bashas or TBG. All three were known union adherents.

Schrade said that Robert Smith and McKinnon also applied for vacant order picker positions with Bashas but Kelley vetoed their transfer ostensibly because both failed to perform satisfactorily when they served in that position before becoming balers. (Tr. 1668.) Connors hired Smith to work for TBG but he was fired 2 weeks purportedly because of an unspecified incident with a Bashas' employee.

A.C. Span only worked as a baler during his 6-month tenure at Bashas. He did not work on Tuesday, January 22, and was not present when the outsourcing decision was announced to the balers. He learned about it later that day from Robert Smith, his brother, and thereafter arranged to meet with Kelley at his office the following day.

Span said Kelley was in a closed-door conference when he arrived for their meeting so he took a seat outside the door until Kelley finished about 10 or 15 minutes later. During his wait, Span claimed that he overheard Kelley remark "[t]hat some of them had attitudes and the others was just troublemakers" followed by some laughter.[104] When the door opened, Span said that Kelley, Eagan, and Connors emerged from the office. (Tr. 1705–1706.) Kelley introduced Connors to Span. Span obtained a TBG application that he filled out and returned to Connors. Span also obtained a Bashas transfer request which he completed and gave to Kelley that day seeking a Distribution Center utility (janitorial) job. When Span turned over his transfer request, Kelley told him immediately that no positions were available.

Henyard said Span told him that Kelley had said Bashas had no more positions so he did not submit a transfer request. At the end of the workday on January 26, Connors told Henyard, McKinnon, and Span that he would not need them. Span said that numerous security personnel were present around the loading dock on that last day. The heightened security

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[104] Kelley flatly denied this remark attributed to him by Span. On cross-examination, Respondent's counsel established that Span had been convicted of a felony and served a prison term within the time frame of Rule 609(a)(1) of the Federal Rules of Evidence. Worse still, Span plainly lied about his criminal record. However, after weighing this background and his untruthful testimony concerning it, I have concluded that Span's account about Kelley's "troublemakers" remark is probably credible. Kelley did not deny any aspect of the scene depicted by Span other than the remark itself. As discussed below, Eagan's absence as a witness has significance that goes beyond this incident alone. Connors testified long before Span and was never recalled. Henyard provided at least minimal corroboration for part of the Span's story by way of explaining why he did not submit a transfer request to Bashas. And finally, no alternative explanation exists as to why, contrary to what Schrade told the balers on January 22 in Connors' presence, TBG did not hire all remaining balers not kept by Bashas.

presence would appear to be consistent with Schrade's fear of possible sabotage as he wrote on his January 16 goal planning form.

TBG paid its employees at hourly rates ranging from $9 to $11. TBG pays no fringe benefits but it makes a health insurance plan available for employees to purchase on their own as well as a vacation fund for employees who want to contribute to it. From the outset, TBG used Bashas' equipment to perform the baler operation.

b. Analysis and conclusions

An employer violates Section 8(a)(3) by terminating a group of its employees and subcontracting the work they performed to a third party in order to discourage its employees from engaging in union activities. *Healthcare Employees Local 399 v. NLRB,* 463 F.3d 909, 918–919 (9th Cir. 2006). See also *Textile Workers v. Darlington Co.,* 380 U.S. 263, 272–275 fn. 19 (1965) (An employer violates Sec. 8(a)(3) if it outsources some of its work in order to chill union support among its remaining workers.) Because these cases turn on the question of motivation, the Board's *Wright Line* causation test, previously described, is used in determining whether the General Counsel has met his requisite burden of proof. 463 F.3d at 919.

The General Counsel argues that Respondent terminated all of its baler employees and outsourced that work to TBG in order to chill the ongoing union organizational activity at the Distribution Center. General Counsel relies principally on the Board's decision in *Bruce Duncan Co.,* 233 NLRB 1243 (1977), enfd. in relevant part 590 F. 2d 1304 (4th Cir. 1979). In that case the Board articulated the following two-pronged test for 8(a)(3) cases of this type taken from *Darlington*, supra, and the factors it looks for in determining whether the test has been met:

> The permanent closing of part of an employer's business is not an unfair labor practice proscribed by Section 8(a)(3) of the Act unless evidence is elicited to support two findings. First, the closing must be motivated, at least in part, by a purpose to chill unionism in any of the remaining facilities of the single employer. Second, it must be found that the employer could reasonably have foreseen such an effect.
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> . . . .
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> In the absence of direct evidence, the Board has in the past found an 8(a)(3) violation in a situation where we could fairly infer that the employer's conduct met the two-pronged test of *Darlington, supra.* This inference, fairly drawn, must rest upon the established facts presented in each case. Generally, the Board in determining whether or not the proscribed "chilling" motivation and its reasonably foreseeable effect can be inferred considers the presence or absence of several factors including, *inter alia,* contemporaneous union activity at the employer's remaining facilities, geographic proximity of the employer's facilities to the closed operation, the likelihood that employees will learn of the circumstances surrounding the employer's unlawful conduct through employee interchange or contact, and, of course, representations made by the employer's officials and supervisors to the other employees. [Id. at 1243.]

Citations and footnotes omitted.

The General Counsel and the Charging Parties argue that Schrade's July 18 e-mail provides direct evidence that the employee union activities among the baler employees motivated the effort to outsource the baler operation from the outset. In addition they argue that all of the factors the Board cited in the *Bruce Duncan* case are present here. Additionally, the

General Counsel argues that, comparatively speaking, the savings Bashas realized from subcontracting the baler operation was not that significant and that, in any event, no showing was made that Bashas "was 'suffering financial adversity' amounting to 'sever economic difficulties' when the subcontracting occurred."

Respondent argues that the efforts to outsource the baler operation began in 2006 and that its officials had no knowledge of the organizing efforts at the Distribution Center until mid-July, well after planning for the outsourcing of the baler operation began.

The filing of the lawsuit against the UFCW and its allies occurred on the eve of Michael Basha's selection of TBG as the baler subcontractor. Clearly, the December 2007 lawsuit reflected Respondent's resolve at the highest corporate level to push back against the perceived abuse its officials felt from the UFCW's corporate campaign. Although Michael Basha eschewed any participation on Respondent's executive committee that coordinated Bashas' responses to the UFCW's campaign, little basis exists to believe that the Distribution Center existed as an island separate from the corporate decisionmaking that related to the union organizing. Hence, it would be possible to infer from the timing of the lawsuit and the baler outsourcing that the both actions sought to counter the UFCW's organizing strategy.

Even in the early stages of the baler outsourcing project, evidence emerged that the union organizing played a pivotal role. Schrade's July 18 e-mail to WSS's Gage clearly provides direct evidence that the prounion sentiments among the baler employees motivated at least in substantial part the initiation of the outsourcing process. Other evidence supports the conclusion that an antiunion motive remained throughout the search for a baler subcontractor. Hence, the DOS bid submitted immediately before Michael Basha selected TBG, took pains to point out that it would use an extensive screening process to insure that it hired the "right" people. In the absence of some explanation from Cash Eagan (to whom the DOS bid letter was directed) to the contrary, I find it reasonable to infer, in view of the all-consuming conflict that existed between Bashas and the UFCW at the time, that the DOS representatives felt it would be to their benefit to make a commitment that they would not hire pro-union workers. Schrade's January 16 planning memo's reference that the outsourcing would be of benefit because it would "remove" associated employee issues provides additional significant evidence that this outsourcing decision was driven by an antiunion motive. Schrade's explanation that this reference concerned immigration problems is not credible where, as here, evidence is lacking that the baler work force as it existed prior to January 27, 2008, exposed Respondent to any serious liability under IRCA. Hence, an inference would be warranted that Schrade sought to cover up an unlawful motive by his untruthful explanation for this significant evidence.

In addition, there is circumstantial evidence that baler outsourcing was designed to chill union activities throughout the Distribution Center. Schrade says as much in his January 16 memo by referring to educating other Distribution Center employees as a benefit of the baler-outsourcing project. Because the baler operation was located at the Distribution Center, other nonbaler employees would likely become aware of the outsourcing itself as well as the enormous adverse impact it had on the affected employees. To make sure other employees knew about the baler outsourcing, Respondent had its managers hold meetings to announce it to them. Although Schrade claimed these meetings were held to reassure the other Distribution Center workers about the baler outsourcing, in fact the talking points used for this purpose did just the opposite by emphasizing industry competitiveness, local market conditions, and the trend in outsourcing non-core functions.

Finally the fact that the Company never revisited its earlier effort to subcontract its entire reclamation function at both Chandler and Ocotillo after it abandoned negotiations with WSS

and received such advantageous pricing from other contractors lends some support for the conclusion that a reason other than pure economics drove the baler outsourcing. Such an inference is consistent with the charge that Respondent subcontracted only the Chandler baler work in order to quell any enthusiasm other Distribution Center employees had for the UFCW. No evidence shows any ongoing union activity at Ocotillo.

Accordingly, I am satisfied that the General Counsel met the initial *Wright Line* burden of establishing that the outsourcing was substantially motivated by the UFCW's organizing campaign and Respondent's desire to chill unionism at the Distribution Center.

Respondent cites *Leeward Nursing Home*, 278 NLRB 1058 (1986), and *Liberty Homes, Inc.*, 257 NLRB 1411 (1981), in support of its affirmative defense relies that it initiated the outsourcing here before the union activity at the Distribution Center commenced. Both cases turn on the peculiar facts involved.

Respondent claims that it initiated the baler outsourcing in 2006 and did not learn of the involvement of its baler employees with the UFCW until July 17, 2007, when supervisors identified balers to Schrade from HFR photos. I find both contentions weak and unconvincing. They rely on Schrade's testimony that I generally find to be unreliable because of his numerous self-serving and contradictory proclamations. I have already referred to his unsupported and untruthful attempt point at immigration problems to explain away disclosures found in his January 16, 2008 transition planning memo. A similar situation exists with regard to the claim that planning for the outsourcing involved here began in 2006. At best, the evidence shows that he did little more than suggest consideration of outsourcing the non-core functions and that Michael Basha challenged him to make a convincing case for doing so but the evidence stops there. Even if one credits the testimony of Schrade and Basha about the discussion of outsourcing at the February 2007 employee compensation conference, the evidence shows nothing other than the fact that they considered it as a possible option to granting the pay increases necessary to remain competitive in certain non-core employee categories. Moreover, the attempt to link this conference with the ultimate outsourcing action taken renders Respondent's explanation almost nonsensical. Thus, if in early 2007, pay increases of up to 20 percent would be required to compete in the labor market for the kind of labor necessary to perform the work involved, then obviously the Company had a significant (and unexplained) reversal in thinking a year later when it subcontracted the baler work to TBG paying wages and benefits 30-plus percent less than Bashas' rates.

In addition, Schrade's attempt to claim that the Vasquez union activity memo in mid-June 2007 (GC Exh. 34) really related to the Teamsters' union that had a long interest in the Distribution Center employees and not the UFCW is simply not believable at all. Nor is this a small matter. The timing of Vasquez' report and Schrade's initial contact with WSS on June 20 seeking a bid for Respondent's reclamation work unquestionably provides a compelling link between beginning of Respondent's serious search for a subcontractor and its knowledge about the union organizing. Respondent called Vasquez to rebut Moroyoqui's claims but never sought support for the Teamster union assertions by Schrade even after the General Counsel questioned Vasquez about his union activity report on cross-examination. Moreover the corporatewide conflict between Bashas and the UFCW by mid-June 2007 is all the more reason to question the veracity of Schrade's claims about the Vasquez memo in particular and the timing of his knowledge about the beginnings of the UFCW organizing efforts at the Distribution Center in general.

Other aspects of Respondent's explanation for the outsourcing left me with little confidence in the accounts provided by its key witnesses on the subject. Cash Eagan's

absence as a witness is one. Michael Basha's claim that Eagan only served to escort potential bidders around the warehouse is belied by the fact that DOS addressed its bid to Eagan and the reference in Connors' critical December 24 e-mail to Basha about a conversation with Eagan that lead to his important proposal modifications. Additionally, Basha claimed more than once that he instructed Schrade find out whether third parties other than WSS would be interested in the baler work. In fact, his July 20 e-mail specifically directs Schrade to do just that. However, Schrade claimed that he never talked to anyone other than WSS because Basha knew he could not objectively evaluate a proposal from others because of his close relationship with WSS.

After carefully examining the evidence provided by Respondent's witnesses, I have concluded that they failed to provide a truthful explanation for subcontracting the baler operation in the middle of the union organizing campaign. That has led to my conclusion that the assertions they have made are a pretext to hide the real reason for subcontracting that work and terminating their employees who performed it. In the circumstances found here, the fact that Bashas reduced its costs by subcontracting the baler work was only an added incidental benefit gained from taking that step. Because Respondent failed to sustain its affirmative defense under *Wright Line,* I find that it violated Section 8(a)(3) by subcontracting the baler operation to TBG as alleged in complaint paragraph 7(p).

CONCLUSIONS OF LAW

1. By the following conduct, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act:

a. Coercively interrogating its employees concerning their union or concerted activities.

b. Creating the impression among its employees that their union activities are under surveillance.

c. Initiating loss-prevention investigations and conducting loss-prevention interviews of employees for the purpose of interfering with their union and concerted activities.

d. Threatening employees with discharge because of their union and concerted activities.

e. Threatening to involuntarily transfer employees to another store because of their union and concerted activities.

f. Threatening employees with unspecified reprisals because they engaged in union or concerted activities.

g. Threatening to alter its historical practice of granting periodic pay and benefit adjustments in the absence of a collective bargaining agreement on a companywide basis to the detriment of its union represented employees.

h. Disparaging Local 99 to the employees it represents in an attempt to undermine that labor organization by blaming it because the July 2007 pay-rate adjustments were withheld from employees it represents.

i. Prohibiting employees from distributing union literature within the Distribution Center at any time or in any place during their working hours.

2. By the following conduct, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act:

a. Suspending Teresa Cano, Ruben Salazar, and Paul Romero in May 2007.

b. Transferring Teresa Cano and Ruben Salazar in May 2007.

c. Issuing Teresa Cano, Ruben Salazar and Paul Romero written, disciplinary warnings in May 2007.

d. Withholding the July 2007 payrate adjustments from its represented employees.

e. Transferring Maria Acosta in September 2007.

f. Terminating the baler employees at the Distribution Center in January 2008 and subcontracting the work they had historically performed to a third party.

3. By altering in July 2007 its practice of granting corporatewide payrate adjustments to its hourly paid workers employed in its retail stores without providing Local 99 with prior notice and an opportunity to bargain concerning that change, Respondent violated Section 8(a)(1) and (5) of the Act.

4. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

My recommended Order below requires Respondent to offer Teresa Cano, Ruben Salazar, and Maria Acosta the opportunity immediately to transfer back to the store from which they were found to have been unlawfully transferred with the full restoration of their seniority and other benefits enjoyed by them prior to being transferred. Respondent will also be required to make Maria Acosta, Teresa Cano, Paul Romero, and Ruben Salazar whole for any losses suffered by them as the result of their unlawful transfers and, in the case of Cano, Romero, and Salazar, suspensions. As the Board has authority under Section 10 of the Act to remedy other matters arising from an employer's unlawful conduct, the recommended Order will require Respondent to reimburse Cano, Romero and Salazar for the money Respondent withheld from their pay as restitution following the loss prevention investigation against them. See, e.g., *Alfred M. Lewis, Inc*., 229 NLRB 757, 759 (1977), enfd in relevant part 587 F.2d 403 (9th Cir. 1978) (remedial required to restore status quo includes suspensions and discharges flowing from unilaterally imposed production quotas). At the hearing, representations were made that Respondent reimbursed with interest the represented employees for the losses suffered when it withheld the July 2007 pay rate adjustment. However, my recommended Order will include a requirement to that effect in any event. Back pay due under the make-whole requirements set forth above as well as the required reimbursements will be computed in accord with *Ogle Protection Service,* 183 NLRB 682 (1970), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173, 1174 fn. 12 (1987). General Counsel requested that interest be compounded on a calendar quarterly basis and provided a lengthy argument in support of that change. The Board, as presently constituted, has declined many such requests by the General

Counsel. As I am bound to follow the current precedent relating to the computation of interest, the request to compound interest is denied.

General Counsel seeks the restoration of the baler operation as it existed the day before the subcontracting took effect. The agreement between Respondent and TBG Logistics is essentially a contract to provide and supervise the labor for the baler operation. As such, I find that little if any no capital investment would be required by the restoration. For that reason, the recommended Order requires Bashas to restore its baler operation using its own employees. As a part of this restoration requirement, Respondent must offer immediate and full reinstatement to its former baler employees and make them whole for any losses they incurred as a result of the unlawful subcontracting. In this instance, backpay will be computed on a calendar quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, supra.

Further, Respondent must expunge from its records, including its loss prevention department records, any reference to unlawful investigations, suspensions, and transfers of Maria Acosta, Teresa Cano, Paul Romero, and Ruben Salazar and notify them in writing that such action has been taken and that any evidence related to those investigations, suspensions, and transfers will not be considered in any future personnel action affecting them. *Sterling Sugars, Inc*., 261 NLRB 472 (1982).

Finally, Respondent must post the customary notice to employees. General Counsel proposed a unified notice and argues that Respondent should be required to post the notice at all of its Arizona locations. That would involve the vast majority of its 160 facilities. Although I denied Respondent's motion prior to the hearing to sever this matter into three separate cases involving the represented store issues, the unrepresented store issues, and the Distribution Center issues, that determination was grounded on the Board's abuse of discretion standard applicable to such motions. Nonetheless, the separation Respondent suggested then made some sense. The unfair labor practices found here involve only a handful of Respondent's retail stores (less than ten percent) and the Chandler Distribution Center. Respondent correctly notes that a posting related to the issues at the represented stores would most likely be confusing to the employees of the unrepresented stores. Similarly, the issues at the distribution center are only marginally relevant for remedial purposes to the issues involved at the retail stores, organized or unorganized. For these reasons, I find separate notices directed to the employees at the locations involved sufficient for remedial purposes. The request for a corporate-wide posting in Arizona is denied. Accordingly, I have fashioned three separate notices for posting at the Distribution Center, the eight remaining represented stores, and the five unrepresented stores where Acosta, Cano, and Salazar worked before and after their unlawful transfers.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[105]

ORDER

The Respondent, Bashas', Inc., Bashas', Food City, and AJ's Fine Foods of Phoenix, Arizona, its officers, agents, successors, and assigns, shall

[105] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Coercively interrogating its employees concerning their union or concerted activities.

(b) Creating the impression among its employees that their union activities are under surveillance.

(c) Initiating loss-prevention investigations and conducting loss-prevention interviews in order to intimidate, harass and threaten employees for engaging in protected union and concerted activities.

(d) Threatening employees with discharge because of their union or concerted activities.

(e) Threatening to involuntarily transfer employees to another store because of their union and concerted activities.

(f) Threatening employees with unspecified reprisals because they engaged in union or concerted activities.

(g) Threatening to alter its historical practice of granting periodic pay and benefit adjustments in the absence of a collective bargaining agreement on a companywide basis to the detriment of its union represented employees;

(h) Disparaging Local 99 to the employees it represents in an attempt to undermine that labor organization by blaming it because the July 2007 pay-rate adjustments were withheld from employees it represents;

(i) Prohibiting employees from distributing union literature within the Distribution Center at any time or in any place during their working hours.

(j) Suspending employees in order to discourage them from supporting United Food and Commercial Workers International Union or any other labor organization;

(k) Transferring employees involuntarily in order to discourage them from supporting United Food and Commercial Workers International Union or any other labor organization.

(l) Issuing written disciplinary warnings to employees in order to discourage them from supporting United Food and Commercial Workers International Union or any other labor organization.

(m) Withholding pay-rate adjustments from its employees in order to discourage them from supporting United Food and Commercial Workers International Union or any other labor organization.

(n) Subcontracting any of its operations and terminating its employees involved in order to discourage them from supporting United Food and Commercial Workers International Union or any other labor organization.

(o) Unilaterally altering its practices concerning the adjustment of pay rates for its represented employees without providing United Food and Commercial Workers Union, Local 99, with prior notice and an opportunity to bargain concerning such alterations.

(p) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Maria Acosta, Teresa Cano and Ruben Salazar the opportunity to transfer back to the retail stores from which they were unlawfully transferred in 2007 and restore fully their seniority and other benefits.

(b) Make Maria Acosta, Teresa Cano and Ruben Salazar whole for any losses they suffered as a result of their unlawful suspensions and transfers in May 2007 with the interest required by law.

(c) Reimburse Teresa Cano $59.88, Paul Romero $973.05, and Ruben Salazar $269.46 with the interest required by law.

(d). Within 14 days from the date of the Board's Order, resume direct operation of the Distribution Center baler functions discontinued on January 26, 2008, and offer all employees terminated at that time full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make whole all employees terminated on or about January 26, 2008 , in connection with the subcontracting of the baler operations at the Distribution Center for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension and/or transfer of Maria Acosta, Teresa Cano, Paul Romero, and Ruben Salazar, and within 3 days thereafter notify them in writing that this has been done and that the suspension and/or transfer will not be used against them in any way.

(g) Within 14 days after service by the Region, post at the facilities designated on the attached Appendices marked A-1, A-2, and A-3 copies of the appropriate notice in both English and Spanish.[106] Copies of the notices, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall

[106] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2007.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., September 24, 2009.

_____
William L. Schmidt
Administrative Law Judge

APPENDIX A-1

NOTICE TO EMPLOYEES

At Bashas', Inc. Stores 63, 64, 65, 66, 67, 69, 124, and 125

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT attempt to undermine or disparage your collective bargaining representative, Local 99, United Food and Commercial Workers International Union (Local 99), by blaming Local 99 for our refusal to give you the same pay-rate increases we gave to our non-union employees in July 2007 even though Local 99 told us that we could give you those increases without bargaining about them.

WE WILL NOT threaten to withhold beneficial wage and benefit adjustments we normally make on a companywide basis from you because you are represented by Local 99.

WE WILL NOT withhold future pay-rate increases from you in order to discourage you from supporting Local 99 as we did in July 2007.

WE WILL NOT refuse to bargain with the Local 99 as your exclusive collective bargaining agent by failing or refusing to notify Local 99 that we plan to grant pay-rate increases and provide its representatives with an opportunity to bargain about the increases. The employees who belong to the appropriate units for bargaining are as follows:

All employees, of our AJ's Fine Foods Stores 63 and 64; Bashas' Stores 65, 66, 67, and 68 and Food City Store 69, including journeyman food clerks, chefs, scanning coordinators, receiving clerks, night stock crew managers, produce managers, customer service supervisors, bakery clerks, deli clerks, merchandise clerks, service center clerks, cake decorators, assistant bakery managers, assistant deli managers, service (fast food) clerks, utility clerks, custodians, and courtesy clerks, excluding all Meat Department employees;

All employees of our AJ's Fine Foods Stores 63 and 64; Bashas' Stores 65, 66, 67, and 68 and Food City Store 69, engaged in retail and wholesale distribution of all fresh meats and all other meat products, including rabbits, fish, and domestic fowl of all kinds, regardless of their origin, displayed in the Meat Departments, including all meats that are cut or prepared for immediate human consumption, including packaged items, fresh, frozen and smoked meats, fresh or frozen fish, poultry and rabbits displayed in the Meat Department, and items in the Deli Section which the Union previously handled, excluding all other employees;

All meat department employees employed at Bashas', Store 125, located at 13005 North Oracle Road, Oro Valley, Arizona 85739, excluding all other employees, guards and supervisors as defined in the Act. All other employees employed at Bashas' Store 125, located at 13005 North Oracle Road, Oro Valley, Arizona 85739, excluding guards and supervisors as defined in the Act;

All meat department employees employed at Food City, Store 124, located at 2600 West 16th Street, Yuma, Arizona 85364, excluding all other employees, guards and supervisors as defined in the Act;

All other employees employed at Food City, Store 124, located at 2600 West 16th Street, Yuma, Arizona 85364, excluding guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole employees employed in the foregoing collective-bargaining units any losses suffered by them because we withheld the pay adjustment given to other employees in July 2007, with interest required by law.

BASHAS', Inc., d/b/a BASHAS',
FOOD CITY, and A.J.'S FINE FOODS

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

NLRB Region 28
2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
Hours: 8:15 a.m. to 4:45 p.m.
602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.

APPENDIX A-2

NOTICE TO EMPLOYEES

At Food City Stores 20, 95, 126, 153, and 162

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT question you about your union sympathies or activities.

WE WILL NOT create the impression that we are monitoring what you do on behalf of a union or what you may believe about the need for a union.

WE WILL NOT start a loss-prevention investigation of your conduct because you support the United Food and Commercial Workers International Union (UFCW), or engage in other concerted activities protected by federal law.

WE WILL NOT demand, under threat of discharge, that you to participate in a loss-prevention interview where the purpose of that interview is to interfere with your right to support UFCW.

WE WILL NOT threaten to discharge you because you support UFCW, or engage in other protected concerted activities.

WE WILL NOT threaten to transfer, or transfer, you to another store in order to retaliate against you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL immediately offer to transfer **Teresa Cano and Ruben Salazar** back to their former positions at Food City store 153, and to restore their seniority and all other rights or privileges.

WE WILL make whole **Teresa Cano**, **Ruben Salazar, and Paul Romero** for any loss of wages or benefits because we unlawfully suspended them in May 2007, with interest required by law.

WE WILL reimburse **Teresa Cano**, **Ruben Salazar, and Paul Romero** for the amounts set out below opposite their names that we withheld from their pay as a result of the loss prevention interviews we subjected them to in May 2007, with interest as required by law.

Cano	$59.88
Salazar	$269.46
Romero	$973.05

WE WILL remove from our files any references to the written disciplines issued to **Teresa Cano**, **Ruben Salazar, and Paul Romero** in May 2007, and **WE WILL** notify them in writing that this has been done, and that the disciplines will not be used against them in any way.

WE WILL remove from our files any references to the suspensions issued to **Teresa Cano**, **Ruben Salazar, and Paul Romero,** in May 2007, and **WE WILL** notify them in writing that this has been done, and that the suspensions will not be used against them in the future in any way.

WE WILL immediately offer to transfer **Maria Acosta** back to her former position at Food City Store 20, and to restore her seniority and all other rights or privileges.

WE WILL make whole **Maria Acosta** for any loss of wages or benefits because we unlawfully transferred her to Store 162 in September 2007, with interest as provided by law.

WE WILL remove from our files any references to **Maria Acosta's** transfer of in September 2007 from Store 20 to Store 162, and **WE WILL** notify her in writing that this has been done, and that this transfer will not be used against her in the future in any way.

BASHAS', Inc., d/b/a BASHAS',
FOOD CITY, and A.J.'S FINE FOODS
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

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2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
Hours: 8:15 a.m. to 4:45 p.m.
602-640-2160.

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APPENDIX A-3

NOTICE TO EMPLOYEES

At Bashas' Chandler, Arizona, Distribution Center

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT question you about your support for United Food and Commercial Workers International Union (UFCW).

WE WILL NOT create the impression that we are monitoring what you do on behalf of a union or what you may believe about the need for a union.

WE WILL NOT threaten you with discharge or other reprisals because you support the UFCW or any other labor organization.

WE WILL NOT prohibit you from distributing UFCW literature at all times and in all places during your working hours at the Distribution Center.

WE WILL NOT subcontract any of our warehouse operations in order to discourage employees from engaging in activities on behalf the UFCW or any other labor organization

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL resume conducting the baler operations at the Distribution Center as we did prior to subcontracting that operation to a third party in January 2008.

WE WILL, within 14 days from the date of this Order, offer all employees laid off from their employment in our baler operation when we unlawfully subcontracted that work to an outside party in January 2008, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole all employees laid off from their employment in our baler operation when we unlawfully subcontracted that work to an outside party in January 2008, for any loss of earnings and other benefits resulting from their layoff with interest as provided by law.

BASHAS', Inc., d/b/a BASHAS',
FOOD CITY, and A.J.'S FINE FOODS
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

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APPENDIX B

Case No.	**Date Filed**	**Allegation Summary**
28-CA-21435	June 19, 2007 Amended 06/29/07	8(a)(1): Denying access at Tucson (69) on 11/28/06; Yuma (124) on 03/08/07; and 06/01/07 at Scottsdale (63); Parker (65); Flagstaff (67); Tucson (69); Oro Valley (125); Phoenix (64); Carefree (66); Apache Junction (68); and Yuma (124) Amendment adds: Phoenix (64) on 12/29/06;
28-CA-21501	July 31, 2007 Amended 09/27/07	8(a)(1) & (3): Denied company-wide wage increase to employees in stores represented by Local 99. Involved Stores 63-69, 124 and 125. Amendment adds: Coercive statements and an 8(a)(5) allegation related to granting wage increase to unrepresented employees but not represented employees, and conditioning a wage increase for represented employees on an agreement for a representation election.
28-CA-21590	September 27, 2007 Amended 11/05/07	8(a)(1) & (3): Maria Acosta discriminated against "in her work duties" on 09/21/07 because she supported the union. Acosta also discriminated against for the same reason by her transfer to a store located farther from her home. Amendment adds coercive statements by Pearl Castillo, Robert Ortiz, Jonnie Padilla, and Vanessa Sainz.
28-CA-21592	September 27, 2007 Amended 11/05/07 Amended 12/31/07	8(a)(1) & (3): Teresa Cano "and others" disciplined on April 6; Cano suspended on May 9, Cano terminated on May 15; and Cano reinstated on condition she transfer. All conduct allegedly because she engaged in union activities. First amendment adds coercive interrogation, conduct and statements by Baltazar Rincon, Joe Hernandez, Jack Eagen, Rae O'Connor, and Joel Konicke as well as the suspension of Ruben Salazar because of his union activities. The second amendment drops the Cano discharge allegation and alleges that she was involuntarily transferred on May 16 for discriminatory reasons.
28-CA-21639	November 1, 2007 Amended 12/31/07	8(a)(1) & (3): Supervisor David Lizarraga warned Ramon de la Torre on October 10, 2007, that Mel Kelly would retaliate against employees supporting the union. Later that day, Kelly suspended de la Torre because of his union activities. Kelly threatened and disciplined Ramon Moroyoqui on October 24 because he supported the union. Kelly "discriminated against" Robert Smith on October 29 because he supported the union. Amendment does not appear to add to or take away any allegation in the original charge.

28-CA-21640	November 2, 2007 Amended 12/31/07	8(a)(1): Kelly threatened Vernelle McKinnon with discharge for supporting the union organizing efforts. Lengthy amendment alleges supervisors Schrade, Lizarraga, and Denise ? solicited grievances, engaged in surveillance, threatened to decrease pay, threatened to contact ICE, invited employees to resign, threatened involuntary transfers, barred union talk and talk about supervisors, refused to accept employee or union responses to discipline, discriminatorily enforced solicitation and distribution rules, promulgated invalid solicitation rules, barred distribution of materials not provided by Employer, preventing employees from seeking union help, issued a written warning to Victor Cabrera, restricted Maria Acosta's ability to work overtime, issued written warnings to Ramon de la Torre, gave Ramon Moroyoqui a more onerous job, and reduced Acosta's work hours.
28-CA-21646	November 5, 2007 Amended 12/31/08	8(a)(1) & (4): supervisor Vazquez discriminated against Moroyoqui on 11/01 and 02/08 because of his union activities and because he filed a charge. Amended charge alleges Vasquez assigned more onerous work to Moroyoqui in late October or early November as an 8(a)(3) only.
28-CA-21676	November 28, 2007	8(a)(1) & (4): Beginning on November 17, supervisors Diane Romero and Ray Valencia discriminated against Maria Acosta because she filed an ulp charge.
28-CA-21739	January 23, 2008 Amended 03/28/08.	8(a)(1), (3) & (4): Discriminatorily terminated all baler employees and offered them an opportunity for rehire through a subcontractor at reduced pay and no benefits because they overwhelmingly supported the union and engaged in a number of specified protected activities. Seeks 10(j) relief. Amendment drops the 8(a)(4) allegation.
28-CA-21785	February 21, 2008 Amended March 28	8(a)(1) & (3): Barring pro-union solicitation while allowing anti-union solicitation since February 14, 2008. Amendment drops the 8(a)(3) allegation.
28-CA-21803	February 29, 2008 Amended March 28	8(a)(1) & (4): Rae O'Connor interrogated Maria Acosta about her immigration status because of her union activities and her participation in NLRB proceedings. Amendment drops the 8(a)(4) allegation.